Supreme Court, U.S.
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No. 06-____

IN THE

Supreme Court of the United States

SINOCHEM INTERNATIONAL CO. LTD.,

Petitioner,

v.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A divided panel of the Court of Appeals for the Third Circuit held that a district court must first conclusively determine if it has personal jurisdiction over the defendant before it may dismiss the suit on the ground of *forum non conveniens*. The court acknowledged that its holding was inconsistent with the interests of judicial economy, recognized that its decision in the case deepened an already existing 2-4 split among the circuits, and invited this Court's review.

The question presented is:

Whether a district court must first conclusively establish jurisdiction before dismissing a suit on the ground of *forum non conveniens*?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties before this Court are petitioner Sinochem International Co., Ltd. ("Petitioner" or "Sinochem") and respondent Malaysian International Shipping Corporation ("Respondent" or "MISC").

There is no parent company or publicly held company owning 10% or more of Petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Sinochem International Co., Ltd. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The original opinion of the United States District Court for the Eastern District of Pennsylvania was issued on February 27, 2004, and is available at 2004 WL 503541 (E.D. Pa.) (App. 48a-69a). The subsequent opinion of that court, denying MISC's motion for reconsideration, was issued on April 13, 2004, and is available at 2004 WL 825466 (E.D. Pa.) (App. 37a-47a).

The opinion of the United States Court of Appeals for the Third Circuit was issued on February 7, 2006, and is reported at 436 F.3d 349 (App. 3a-36a). The Third Circuit's order denying rehearing and rehearing *en banc* is unreported (App. 1a-2a).

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was issued on February 7, 2006. App. 3a-36a. The Court of Appeals' order denying Sinochem's petition for rehearing *en banc* was issued on March 23, 2006. App. 1a-2a. On June 6, 2006, Petitioner timely filed an application to extend the time to file a petition for certiorari from June 21, 2006, to July 21, 2006. On June 8, 2006, Justice Souter granted the application. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal provisions involved are the Due Process Clause of the Fifth Amendment to the United States Constitution and Rule 4(k)(2) of the Federal Rules of Civil Procedure, which are set out in full in the Appendix to this Petition. App. 70a-71a.

STATEMENT

This case centers on allegations of misconduct committed by one non-U.S. entity against another non-U.S. entity, where a significant number of the relevant acts, and most of the relevant witnesses and documents, are located in China. The dispute is being adjudicated in China, where China's courts have already determined that they have jurisdiction over the action initiated there by Sinochem. In the parallel action filed by MISC in federal district court, the court concluded that it had subject-matter jurisdiction over the action, but was unable to determine without discovery whether it had personal jurisdiction over the defendant, Sinochem. The court dismissed the suit on *forum non conveniens* grounds.

A divided panel of the Third Circuit vacated the judgment of dismissal and remanded for the district court to first establish conclusively whether it has personal jurisdiction over Sinochem before reaching the *forum non conveniens* issue. The court recognized that its decision deepened the split among the courts of appeals regarding whether a complete and conclusive determination of jurisdiction must precede a *forum non conveniens* dismissal. The court admitted that its rule does not "comport with the general interests of judicial economy" and may "ultimately result in a waste of resources," App. 26a, but concluded that its decision was compelled by this Court's precedents. The court of appeals nonetheless invited this Court's review: "If the Supreme Court wishes otherwise, we leave that determination to it." App. 26a.

A. Background

In 2003, Petitioner Sinochem, a Chinese company, contracted with Triorient Trading Inc., an American company not a party to this action, for the sale of steel coils. Pursuant to that contract, a valid bill of lading showing that the cargo had been loaded on or before April 30, 2003, had to be issued before the seller could receive payment. The

purchase contract called for any disputes arising out of the contract to be arbitrated under Chinese law. App. 37a-38a, 49a.

The steel coils were loaded in Philadelphia onto a vessel, owned by Respondent MISC, and shipped to China. A bill of lading acknowledging receipt of the cargo, dated April 30, 2003, was issued in Philadelphia. The contract of carriage accompanying the bill of lading called for the application of the Hague Rules, which implicates the Carriage of Goods at Sea Act (COGSA), ch. 229, § 1, 49 Stat. 1207 (1936).[1] App. 38a, 49a.

B. The Parallel Chinese and Federal District Court Proceedings

On June 8, 2003, Sinochem filed a petition for preservation of a maritime claim in the Guangzhou Admiralty Court; in response to Sinochem's petition, the court ordered the ship arrested. Upon its arrival at the Chinese port, MISC's vessel carrying Sinochem's cargo was in fact arrested by order of the Admiralty Court. The arrest was based on an allegation that MISC had fraudulently backdated the bill of lading (*i.e.*, dated the bill of lading April 30, 2003, when it actually did not load the shipment until May). As required by the Chinese court's order, MISC posted a U.S. $9,000,000 security bond to obtain release of its vessel. App. 38a, 50a. On July 2, 2003, Sinochem timely perfected its petition for preservation by filing a complaint in

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[1] This document also incorporated by reference a charter party—a contract between MISC and Pan Ocean, the carrier, regarding the vessel. The charter party here is not part of the record because Pan Ocean would not disclose its terms. A letter from Pan Ocean's counsel indicated that the charter party chose "New York arbitration with U.S. law" to apply to disputes under it. An opinion of the Chinese court in the related proceeding, however, stated that English law governed disputes under the charter party. App. 38a n.2, 66a.

the Chinese Admiralty Court, alleging that it had suffered damage due to MISC's alleged backdating of the bill of lading. App. 50a.

While the Chinese action was pending, and after Sinochem had filed its petition for preservation of a maritime claim, MISC filed this suit in the United States on June 23, 2003, alleging that, when Sinochem petitioned the Chinese Admiralty Court for the vessel's arrest, it negligently misrepresented "the vessel's fitness and suitability to load its cargo." App. 39a. Sinochem filed a motion to dismiss MISC's complaint for lack of subject matter and personal jurisdiction, for *forum non conveniens*, and for "failure to observe the rules of [international] comity." App. 48a, 51a.

After filing the U.S. action, MISC challenged the jurisdiction of the Chinese courts to entertain Sinochem's Complaint. The Admiralty Court rejected that challenge; MISC appealed that rejection; and, on February 27, 2004, the Guangdong Higher People's Court (the "Chinese High Court") affirmed, concluding that the Chinese Admiralty Court had jurisdiction over the dispute. App. 6a. Specifically, the Chinese High Court rejected MISC's argument that the choice-of-law provisions of the bill of lading and the charter party controlled the case and that jurisdiction therefore properly rested with the London Maritime Arbitration Commission. App. 6a. That judgment was not further appealable. App. 6a n.6.

Back in the United States, the district court, on March 1, 2004, granted Sinochem's motion to dismiss and later denied MISC's motion for reconsideration of that ruling. The court determined that it had subject-matter jurisdiction over MISC's action pursuant to admiralty and maritime jurisdiction, *see* 28 U.S.C. § 1333, because the alleged tort, the seizure of the vessel at a port in China, occurred on navigable waters, and because the incident had a sufficient connection to maritime activity. App. 9a-15a.

As to personal jurisdiction, the court concluded that it did not have specific personal jurisdiction over Sinochem under the Pennsylvania long-arm statute. App. 55a-59a. However, the court stated that "provided limited discovery, [MISC] might be able to identify sufficient national contacts to establish personal jurisdiction over [Sinochem] through the federal long-arm statute," should the assertion of such jurisdiction be consistent with Sinochem's due process rights. App. 59a. The court declined to order such discovery or rule on this issue because it concluded that dismissal was appropriate on the basis of *forum non conveniens*. App. 60a, 67a.

In dismissing on the ground of *forum non conveniens*, the district court noted, without any argument to the contrary by MISC, that an adequate alternative forum for deciding MISC's negligent-misrepresentation claim existed in the Chinese Admiralty Court. App. 67a-68a. The district court concluded that the "private interest" factors of the *forum non conveniens* determination, such as ease of access to sources of proof and availability of compulsory process to obtain the attendance of unwilling witnesses, pointed in favor of dismissal because the main witnesses were located in China, and the American witnesses would have to travel to China for Sinochem's action regardless of whether MISC's action continued in the United States. App. 64a, 68a.

The district court also observed that the "public interest" factor, the avoidance of unnecessary conflict-of-laws problems, also favored dismissal because Chinese law would apply to MISC's claim that Sinochem made negligent misrepresentations to the Chinese Admiralty Court. App. 65a-66a. Furthermore, as no United States' interests were implicated, the court held that dismissal for *forum non conveniens* was appropriate despite the deference that must be paid to the plaintiff's (in this case MISC's) choice of forum. App. 67a. The district court subsequently issued an opinion denying MISC's motion for reconsideration of the dismissal for *forum non conveniens*. App. 37a-47a.

C. The Court of Appeals' Decision

A divided panel of the Court of Appeals for the Third Circuit affirmed the finding of admiralty jurisdiction, but concluded that the district court improperly decided the *forum non conveniens* motion prior to ascertaining whether it had personal jurisdiction over Sinochem. The panel majority, Judges Ambro and Alarcon (Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation), concluded that, while *forum non conveniens* is a non-merits ground for dismissal, the district court nonetheless should have determined whether personal jurisdiction existed prior to dismissing on *forum non conveniens* grounds because "the very nature and definition of *forum non conveniens* presumes that the court deciding this issue has valid jurisdiction . . . and venue." App. 21a. The majority acknowledged that "Courts of Appeals have split on the issue," and chose the rule adopted by the Fifth, Seventh, and Ninth Circuits, while rejecting the rule that governs in the Courts of Appeals for the Second and D.C. Circuits. App. 16a-17a.

The majority candidly recognized that its decision "may not seem to comport with the general interests of judicial economy," and that it reached its decision not "without some regret, as we would like to leave district courts with another arrow in their dismissal quivers." App. 26a. Believing itself bound by precedent, however, the majority invited this Court's review: "If the Supreme Court wishes otherwise, we leave that determination to it." App. 26a.

Judge Stapleton filed a dissenting opinion, observing that the court would "mak[e] no assumption of law declaring power" by deciding not to exercise whatever jurisdiction it may have, and therefore dismissal on *forum non conveniens* grounds without first determining its own jurisdiction is proper. App. 36a (internal quotation marks omitted). Judge Stapleton also noted that the majority's decision "mandates that the District Court subject Sinochem to discovery and

other proceedings in a forum which the District Court rightly regards as inappropriate." App. 33a.

Sinochem petitioned for rehearing *en banc*, which was denied. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for three basic reasons, as set forth below:

First, the majority's decision deepens a sharp conflict in the circuits, and departs from this Court's precedent by concluding that *forum non conveniens* is not a threshold non-merits issue that can be determined in advance of personal jurisdiction.

Second, the Third Circuit's approach is inefficient and incorrect. Notably, the majority not only acknowledged that its decision undermines judicial economy, but also invited this Court's review to correct its decision and resolve the existing split. Furthermore, the rule adopted is inconsistent with the constitutional-avoidance doctrine.

Third, the question presented is important and is likely to recur with increasing frequency in today's globalized economy. This case provides an ideal vehicle for resolving that question. By reversing the Third Circuit, the Court can ensure that the longstanding doctrine of *forum non conveniens* reflects the appropriate respect and solicitude for other nations' judicial systems.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *STEEL CO.* AND *RUHRGAS*, AND DEEPENS THE 2-4 SPLIT AMONG THE CIRCUITS

The decision below is contrary to this Court's decisions in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), and *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999). Furthermore, as the majority acknowledged, "Courts of Appeals are split on the issue." App. 16a. The Third Circuit's decision, which conflicts with decisions of the

Second and D.C. Circuits, but aligns that court with the rule that controls in the Fifth, Seventh, and Ninth Circuits, exacerbates the existing split. Moreover, the Third Circuit's decision is based on the erroneous conclusion that *forum non conveniens* cannot be decided in advance of deciding jurisdiction.

A. The Majority's Decision Is Contrary to This Court's Decisions in *Steel Co.* and *Ruhrgas*

In *Steel Co.*, 523 U.S. 83, this Court began establishing an adjudicative hierarchy—that is, the order in which the federal courts must rule on threshold issues, jurisdictional or otherwise. The Court in *Steel Co.* divided the world into two basic categories of issues: merits and jurisdictional; in turn, jurisdictional issues may be either discretionary or non-discretionary. Rejecting the concept of "hypothetical" jurisdiction that some lower courts had adopted, the Court held that disputes over Article III jurisdiction (such as constitutional standing) must be resolved before deciding the merits. *Id.* at 94 ("We decline to endorse ['hypothetical jurisdiction'] because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.").

The Court in *Steel Co.* also distinguished between categories of cases where the threshold choice is between deciding merits or jurisdictional issues, and cases where the threshold choice is between discretionary and non-discretionary jurisdictional issues. *Id.* at 100-01 n.3. The Court suggested that there is no preferred hierarchy of decision-making between such jurisdictional issues. Citing *Moor v. Alameda County*, 411 U.S. 693, 715-16 (1973), the Court observed that in that case, "we declined to decide whether a federal court's pendent jurisdiction extended to state-law claims against a new party, because we agreed with the District Court's discretionary declination of pendent jurisdiction." *Steel Co.*, 523 U.S. at 100 n.3. The Court also cited *Ellis v. Dyson*, 421 U.S. 426, 436 (1975), noting that

"the authoritative ground of decision" upon which the District Court had relied was *Younger* abstention, which has been treated as jurisdictional, rather than determining first whether there was a "case or controversy." *Steel Co.*, 523 U.S. at 100 n.3. The Court also acknowledged that statutory standing questions can be given priority over Article III questions. *Id.* at 97 n.2. In sum, while rejecting "hypothetical jurisdiction," the Court "acknowledged" that the cases allowing discretionary jurisdictional decisions to precede Article III inquiry "have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question." *Id.* at 101.

In *Ruhrgas*, the Court elaborated on *Steel Co.*'s distinction between jurisdictional and merits questions, and held that, as between jurisdictional questions, "there is no unyielding jurisdictional hierarchy." 526 U.S. at 578. Thus, courts are not obligated to resolve subject-matter jurisdiction before personal jurisdiction, particularly where a "defect in subject-matter jurisdiction raises a difficult and novel question," and personal jurisdiction is "straightforward" and presents "no complex question[s]." *Id.* at 588. Reaffirming the point the Court made in *Steel Co.*—that it is permissible to select between non-discretionary and discretionary jurisdictional bases for dismissal—the Court explained that "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 585 (citing *Moor* and *Ellis*). Quoting approvingly from the D.C. Circuit opinion in *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998), *superseded by statute on other grounds*—with which the Third Circuit in this case explicitly disagreed—this Court posited that "'a court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles.'" *Ruhrgas*, 526 U.S. at 584-85. Notably, the full quote in *Papandreou* refers to "non-

merits grounds such as *forum non conveniens* and personal jurisdiction . . . ." 139 F.3d at 255.

Similarly, in *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court approved of the "routin[e]" practice of addressing "the question whether the statute itself *permits* the cause of action it creates to be asserted against States" before addressing "whether the Eleventh Amendment forbids [the] statutory cause of action." *Id.* at 779. The reason underlying this rule applies with even greater force to the issue presented by this case of addressing *forum non conveniens* before addressing jurisdiction: "[T]here is no realistic possibility that addressing the statutory question will expand the Court's power beyond the limits that the jurisdictional restriction has imposed." *Id.*

The circuits have divided in their interpretation of *Steel Co.* and *Ruhrgas*, disagreeing as to whether *forum non conveniens* is a threshold issue which can be decided prior to ascertaining a district court's jurisdiction. While this Court has yet to answer the question, the answer is suggested by *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994), and *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979), which indicate that *forum non conveniens* fits squarely within the category of "threshold grounds for denying audience to a case on the merits," *Ruhrgas*, 526 U.S. at 585. "At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening *venue* provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined." *Am. Dredging Co.*, 510 U.S. at 453 (emphasis added). The Court emphatically stated that "the [*forum non conveniens*] doctrine is one of procedure rather than substance," *id.*, as it "does not bear upon the substantive right to recover, and is not a rule upon which . . . actors rely in making decisions about primary conduct—how to manage their business and what precautions to take." *Id.* at 454. *See also Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148

(1988) ("The District Court did not resolve the merits of [petitioner's] claim . . . . Rather, the only issue decided by the District Court was that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine.").

Consistent with the view that *forum non conveniens* is a "supervening venue provision," the Court in *Leroy* resolved an actual venue question prior to addressing the issue of personal jurisdiction: "Without reaching either the merits or the constitutional question arising out of the attempt to assert personal jurisdiction over appellants, we now reverse because venue did not lie in the [original judicial district]." 443 U.S. at 180. The Court explained that while the "question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum," "when there is a sound prudential reason for doing so, . . . *a court may reverse the normal order of considering personal jurisdiction and venue*." *Id.* (emphasis added). This flexibility is allowed because "[n]either personal jurisdiction nor venue is fundamentally preliminary in the sense that subject matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties." *Id.*[2]

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[2] To be sure, there appears to be some tension between *Ruhrgas*'s equating of subject-matter and personal jurisdiction, on the one hand, and the elevation of subject-matter jurisdiction over personal jurisdiction and venue, on the other hand, in *Leroy* and in this Court's recent decision in *Wachovia Bank v. Schmidt*, 126 S. Ct. 941, 950-51 (2006) ("[V]enue and subject-matter jurisdiction are not concepts of the same order. Venue is largely a matter of litigational convenience. . . . Subject-matter jurisdiction . . . concerns a court's competence to adjudicate a particular category of cases."). This "broken circle" in the Court's own jurisprudence, *Steel Co.*, 523 U.S. at 97 n.2, further counsels in favor of this Court's resolution of the question presented.

The decision below, while purporting to agree with *Am. Dredging Co.* that *forum non conveniens* is not a merits issue, nevertheless concluded that personal jurisdiction must be verified before *forum non conveniens* dismissal, relying in part on *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). App. 21a-22a. In *Gulf Oil*, the Court enumerated the criteria for applying *forum non conveniens* and noted in passing that "[t]he principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." 330 U.S. at 507. However, *Gulf Oil* did not address the order in which to resolve preliminary, non-merits challenges in a case. And, most importantly, *Gulf Oil* long precedes *Am. Dredging Co.*, *Leroy*, as well as *Steel Co.*, *Ruhrgas*, and multiple other decisions holding that a court may indeed choose to decide threshold, non-merits issues before deciding whether it has jurisdiction, such as in *Moor*, 411 U.S. 693, *Ellis*, 421 U.S. 426, and other cases.[3] The court below nonetheless held that personal jurisdiction must be established prior to dismissal on *forum non conveniens* grounds.[4]

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[3] *See also Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) ("Nevertheless, application of the *Totten* rule of dismissal, like the abstention doctrine of *Younger v. Harris*, or the prudential standing doctrine, represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction.") (internal citations omitted); *Kowalski v. Tesmer*, 543 U.S. 125, 129 & n.2 (2004) (assuming the existence of Article III standing and addressing the "alternative threshold question" whether prudential requirements of standing were satisfied).

[4] In so concluding, the Third Circuit adopted the nomenclature of a law-review article, which posited three categories of issues: "jurisdictional," "merits," and issues that "fit[] somewhere between" pure jurisdictional issues and pure merits issues. *See* Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 321-22 (1999). The Third Circuit reasoned that *forum non conveniens* belongs to this new "third category." App. 18a. However, the majority

The decision of the Court of Appeals for the Third Circuit, therefore, is contrary to *Ruhrgas* and *Steel Co.* *Forum non conveniens* is a non-merits, "supervening venue provision," *Am. Dredging Co.*, *supra*, and, as such, can be decided prior to determining personal jurisdiction, *Leroy*, *supra*. The court of appeals' contrary conclusion, therefore, subverts the second principle of *Steel Co.* and *Ruhrgas*—that threshold non-merits questions may be addressed prior to deciding subject-matter or personal jurisdiction.

B. The Decision Below Exacerbates the 2-4 Split Among the Courts of Appeals

This case presents this Court with a square and well-developed conflict between courts of appeals, which have disagreed in their application of *Steel Co.* and *Ruhrgas*. In reasoned and thorough opinions, two Courts of Appeals, the D.C. Circuit and the Second Circuit, have held that *forum non conveniens* can be decided prior to ascertaining jurisdiction. By contrast, the Third Circuit, upon examination of the competing viewpoints, joined the Fifth, Seventh, and Ninth Circuits, and held the opposite—that

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ignored the conclusion reached by the article, just two pages after the analysis upon which it relied, that it is proper to dismiss on *forum non conveniens* grounds prior to determining jurisdiction:

> [T]hese issues [non jurisdiction and non merits-related issues, *i.e.*, the "third category"] could also theoretically be reached in the absence of verifying Article III jurisdiction. Thus, a court could in fact dispose of a suit without verifying its Article III jurisdiction—presumably against the party asserting jurisdiction—because it would not be reaching the merits in the absence of such jurisdiction. This practice as well would appear to be a form of hypothetical jurisdiction, although [it] would not run afoul of *Steel Co.* insofar as the merits themselves would remain undetermined.

Idleman, *supra*, at 323. The article's analysis is entirely consistent with the analysis in *Papandreou*, on which this Court relied in *Ruhrgas*, and the article so recognizes. *Id.* at 332, 336. The Third Circuit, however, chose to ignore this part of the article's analysis.

forum non conveniens dismissal cannot precede a determination of jurisdiction. The majority's decision in this case candidly acknowledged the existence of this irreconcilable direct conflict: "Courts of Appeals have split on this issue." App. 16a. The conflict is squarely presented and ripe for this Court's adjudication.

The Third Circuit's decision conflicts with the D.C. Circuit's decision in *Papandreou*, which held that dismissal on *forum non conveniens* grounds prior to ascertaining subject-matter jurisdiction is permissible. Indeed, this Court in *Ruhrgas* relied on *Papandreou* to conclude that personal jurisdiction may be determined prior to subject-matter jurisdiction. The full quote from *Papandreou* states:

> [A]lthough subject-matter jurisdiction is special for many purposes (*e.g.*, the duty of courts to bring it up on their own), *a court that dismisses on other non-merits grounds such as forum non conveniens* and personal jurisdiction, *before finding subject-matter jurisdiction, makes no assumption of law-declaring power* that violates the separation of powers principles underlying *Mansfield* and *Steel Company*. Indeed, in *Steel Company*, the Court expressly endorsed [declining to exercise pendent jurisdiction, as in *Moor*, or abstaining under *Younger*, as in *Ellis*].

139 F.3d at 255 (emphasis added). The D.C. Circuit acknowledged that because *forum non conveniens* is "a deliberate abstention from the exercise of jurisdiction," it "may appear logically to rest on an assumption of jurisdiction." *Id.* However, based on principles of *Moor*, approved in *Steel Co.*, the D.C. Circuit explicitly concluded that *forum non conveniens* is "as merits-free as a finding of no jurisdiction." *Id.* at 255-56. Hence, dismissal on *forum non conveniens* grounds, without reaching the jurisdictional

issues presented by the Foreign Sovereign Immunities Act, was permissible. *Id.* at 256.[5]

The Third Circuit's decision also conflicts with the Second Circuit's decision in *In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002). There, the Second Circuit approved the district court's bypass of the statutory subject-matter jurisdiction issue in favor of first addressing the *forum non conveniens* question. *Id.* at 497. As a starting point, the Second Circuit cited *Steel Co.*'s observation that some of this Court's precedents have "diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question." *Id.* The court then read *Steel Co.* as "barring the assumption of 'hypothetical jurisdiction' only where the potential lack of jurisdiction is a constitutional question." *Id.* Then, the court endorsed the D.C. Circuit's reasoning in *Papandreou* that *forum non conveniens* is "merits-free" and hence, can be considered first, just as declination of exercise of pendent jurisdiction can be considered first. *Id.* at 498.

The Third Circuit's decision is, however, consistent with certain decisions of the Fifth, Seventh, and Ninth Circuits. App. 16a-17a (describing the split). In *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir. 2005) (*per curiam*), the Fifth Circuit held that "the district court erred in dismissing the case on *forum non conveniens* grounds without first determining whether it had subject-matter jurisdiction." *Id.* at 652. The Fifth Circuit rejected the reasoning of the Second Circuit in *Monegasque* and of

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[5] *See also Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1418 (2006) (relying on the court's prior holding in *Papandreou* to conclude that it was not necessary to resolve the question of the district court's subject-matter jurisdiction before dismissing the case as presenting a nonjusticiable political question).

the D.C. Circuit in *Papandreou*, believing that adjudicating the *forum non conveniens* question would be akin to assuming hypothetical jurisdiction, contrary to *Steel Co.* and *Ruhrgas*, and holding that, in any event, *forum non conveniens* is a merits-type issue. *Id.* at 653 ("the question of convenience of the forum is not completely separate from the merits of the action").[6]

The Seventh and Ninth Circuits, while not engaging in extensive discussions of the issue, have nevertheless staked out their positions. In *Kamel v. Hill-Rom Co.*, 108 F.3d 799 (7th Cir. 1997), the Seventh Circuit endorsed the view that jurisdiction is a prerequisite for considering a *forum non conveniens* motion. The court observed that the presence of Chedid, one of the parties in the action, disrupted subject-matter jurisdiction as he was a "stateless" expatriate whose status "upsets complete diversity under § 1332(a)(3)." *Id.* at 805. The court noted that "[t]he district court therefore lacked jurisdiction to rule on Hill-Rom's *forum non conveniens* motion because Chedid was a party to this action." *Id.* The court dismissed Chedid as a dispensable party and affirmed the district court's dismissal of Hill-Rom on *forum non conveniens* grounds. *Id.* at 805-06.

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[6] Earlier Fifth Circuit cases had reached the same conclusion, albeit without detailed explanations. *See, e.g., Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 542 (5th Cir. 1997) (rejecting defendants' invitation to rule on *forum non conveniens* before determining jurisdiction because "[t]he Supreme Court has . . . stat[ed] that 'the doctrine of [*forum non conveniens*] can never apply if there is absence of jurisdiction or mistake of venue'") (quoting *Gulf Oil Corp.*, 330 U.S. at 504); *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1542 (5th Cir. 1991) ("We must determine, initially, whether the federal district court had jurisdiction over this removed action. If it did not have jurisdiction at the time it ruled on the question of *forum non conveniens*, we may not consider the issue and must direct the district court to remand the entire proceedings to state court.").

In *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *aff'd in part, cert. dismissed in part*, 538 U.S. 468 (2003), the Ninth Circuit held that "[o]f course, the federal courts may decide [the *forum non conveniens*] issue only if we have jurisdiction over the case." *Id.* at 800 n.3.[7]

The Third Circuit rejected the approach of the Second and D.C. Circuits, and sided with the Fifth, Seventh, and Ninth Circuits, on the ground that the Second Circuit's *Monegasque* decision "cling[s]" to the discarded concept of hypothetical jurisdiction. App. 24a. As to the D.C. Circuit's *Papandreou* decision, the majority viewed it as internally inconsistent because the D.C. Circuit acknowledged that "'abstention may appear logically to rest on an assumption of jurisdiction.'" App. 25a (quoting *Papandreou*, 139 F.3d at 255). Thus, perceiving itself as "go[ing] a more certain way," the Third Circuit panel majority held that because district courts "either have jurisdiction to decide *forum non conveniens* motions or they do not," they must have jurisdiction before ruling on those motions. App. 26a.

The conflict on this question is well-developed: Courts of appeals on both sides of the issue have carefully examined relevant precedents of this Court, and have engaged a variety of interpretive tools to ascertain the correct rule. Little would be gained from further percolation. Indeed, the

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[7] Several years later, in *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1338 (2006), the Ninth Circuit concluded that issues of subject-matter jurisdiction should be decided prior to Rule 19 issues. *Id.* at 1106. Noting that "it is not always easy to determine whether a particular issue is the type of 'threshold' matter which, if decided adversely to the plaintiff, obviates the need to address other threshold questions," the Ninth Circuit pointed to the split between *Dominguez-Cota* and *Monegasque*. *Id.* The Ninth Circuit did not cite its own *Patrickson* decision, however. In any event, even though "the parties ha[d] not briefed the issue" of order of adjudication in *Wilbur*, *id.*, the decision in *Wilbur* was consistent with the approach taken in *Patrickson*.

conflict here is significantly more mature than the one presented in *Ruhrgas*, where the Court granted review based on a 1-1 split in the courts of appeals. *See* Petition for Writ of Certiorari at 11, *Ruhrgas AG v. Marathon Oil Co.* (1999), 526 U.S. 574 (No. 98-470).

II. THE COURT OF APPEALS' DECISION LEADS TO MULTIPLE INEFFICIENCIES AND IS INCONSISTENT WITH THE PRINCIPLE OF CONSTITUTIONAL AVOIDANCE

There is no dispute that the rule adopted by the Third Circuit (and three other Courts of Appeals) is inefficient. Indeed, the majority recognized that its own rule "may not seem to comport with the general interests of judicial economy." App. 26a. The majority acknowledged that "[w]e do not reach this holding without some regret, as we would like to leave district courts with another arrow in their dismissal quivers." App. 26a. In his dissent, Judge Stapleton agreed and emphasized the extent of the inequities wrought by the majority's decision: It "mandates that the District Court subject Sinochem to discovery and other proceedings in a forum which the District Court rightly regards as inappropriate." App. 33a. In fact, the majority, recognizing just how undesirable its rule is, but perceiving itself bound by precedent, expressly invited this Court to correct its decision: "If the Supreme Court wishes otherwise, we leave that determination to it." App. 26a.

The incorrectness and inefficiency of the majority's rule is all the more obvious in light of the factors a court must consider in the *forum non conveniens* determination, as set forth in *Am. Dredging Co.* Relying on Justice Jackson's opinion in *Gulf Oil*, 330 U.S. at 508-09, the Court noted that "[a]n interest to be considered, and the one likely to be most pressed, is the private interest of the litigant." *Am. Dredging Co.*, 510 U.S. at 448. At its essence, the interest is in making the "trial of a case easy, expeditious and inexpensive." *Id.* (listing factors such as "the relative ease of access to sources

of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action"). *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (*forum non conveniens* dismissal is appropriate where a "trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience"). As Judge Stapleton explained, the majority's rule "subverts a primary purpose of the doctrine of *forum non conveniens*" of "protect[ing] a defendant from being compelled to litigate in a forum where it will have to shoulder the burden of substantial and unnecessary effort and expense." App. 33a.

But the decision below is even more troubling than that: The majority did not take into account the "public interest" side of the *forum non conveniens* equation. On the "public interest" side, courts must consider "[a]dministrative difficulties" that occur "when litigation is piled up in congested centers instead of being handled at its origin." *Am. Dredging Co.*, 510 U.S. at 448. *See also Piper Aircraft Co.*, 454 U.S. at 241 (*forum non conveniens* dismissal is warranted where a chosen forum "is inappropriate because of considerations affecting the court's own administrative and legal problems"). Moreover, it is not fair to impose the burden of jury duty "upon the people of a community which has no relation to the litigation." *Am. Dredging Co.*, 510 U.S. at 448. It is also more appropriate to try a case in a jurisdiction whose law governs, "rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Id.* at 448-49. In sum, the decision below is at odds with every one of the stated purposes of *forum non conveniens*.

Indeed, this case is a paradigmatic example of a suit that ought to be dismissed on *forum non conveniens* grounds, rather than forcing parties to engage in extensive discovery to determine the existence of personal jurisdiction over Sinochem—just so the district court can obtain the power to

dismiss the suit for *forum non conveniens*. As the district court observed, there is scarcely any relation of this litigation to the United States. *See* App. 66a ("The sole possible factor implicating U.S. interests involves the choice of law clause, in the charter party, which the bill of lading incorporates."). *But see* n.1, *supra*. Moreover, "the matter is expected to proceed in the Guangzhou court. . . . We simply cannot justify doubling the expenses of the parties, taxing witnesses twice to participate in litigation, and consuming this Court's scarce resources to replicate the Chinese litigation, especially considering that both parties can make use of our discovery process to assist foreign litigation, through 28 U.S.C. § 1782." App. 43a.

Besides being inefficient and contrary to this Court's decisions in *Steel Co.* and *Ruhrgas*, *see* Part I(A), *supra*, the majority's decision is inconsistent with the principle of constitutional avoidance. This long- and well-established doctrine holds that federal courts should avoid bottoming their rulings on constitutional grounds if an alternative and non-constitutional ground is available. *See, e.g., Leroy*, 443 U.S. at 181 ("As a prudential matter it is our practice to avoid the unnecessary decision of novel constitutional questions."); *Hagans v. Lavine*, 415 U.S. 528, 547 (1974) ("[A] federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available.").[8] These cases "illustrate in practice the wisdom

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[8] *See also Rescue Army v. Mun. Ct. of Los Angeles*, 331 U.S. 549, 568 (1947) ("[T]his Court has followed a policy of strict necessity in disposing of constitutional issues."); *Ala. State Fed'n of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 461 (1945) (It is the "considered practice not . . . to decide any constitutional question in advance of the necessity for its decision."); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the

of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case." *Hagans*, 415 U.S. at 547 n.12.

In this case, the determination of whether the district court has personal jurisdiction over Sinochem, a non-resident defendant, implicates Sinochem's due process rights under the Fifth Amendment. *See* App. 60a ("Under [Fed. R. Civ. P.] 4(k)(2), a plaintiff may establish that a court has personal jurisdiction over a defendant if it can show that: (1) the claim arises under federal law; (2) the defendant does not have general jurisdiction in any state; and (3) jurisdiction would survive a due process analysis."). As the Court explained in *Leroy*, where, as here, a long-arm statute authorizes jurisdiction over non-residents "consistent with the Constitution and laws of the United States," *see* Fed. R. Civ. P. 4(k)(2), a court undertaking a personal-jurisdiction analysis must necessarily "decide a question of constitutional law that it has not heretofore decided," because each case is factually unique. 443 U.S. at 181. Thus, "[a]s a prudential matter it is our practice to avoid unnecessary decision of [such] novel constitutional questions." *Id.* Indeed, in this case, the district court granted the motion to dismiss on *forum non conveniens* grounds only after examining in detail every basis for personal jurisdiction and concluding that only with further discovery would the court be able to ascertain whether it has personal jurisdiction over Sinochem. *See* App. 59a. Since a decision on *forum non conveniens* grounds affords an alternative, non-constitutional ground for decision, it is therefore most consistent with the principle of constitutional avoidance to consider *forum non conveniens* before definitively verifying, through discovery, whether the

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latter."); *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909) (same).

court has personal jurisdiction over Sinochem consistent with the Due Process Clause.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THIS IMPORTANT AND RECURRING QUESTION

The question presented in this petition is recurring, important, and has widespread national and international consequences. This case presents an ideal vehicle for resolving this question.

First, as this Court has explained, the goal of the *forum non conveniens* doctrine is two-fold: not to impose undue burdens on litigants in a foreign forum, and not to impose undue burdens on United States' courts and its juries by allowing litigation of disputes having little or nothing to do with the United States. *Am. Dredging Co.*, 510 U.S. at 448-49. Whether these purposes can be furthered depends in large part on whether parties need to expend their own and the federal courts' time, effort, and resources on affirmatively establishing the existence of jurisdiction prior to moving to dismiss on *forum non conveniens* grounds. Putting what will typically be non-U.S. companies to the full-blown expense and burden of making jurisdictional demonstrations just to get out of court, even though the suit is ultimately dismissable on *forum non conveniens* grounds at the outset, undercuts the dual purposes of the *forum non conveniens* doctrine.

Second, as commerce is becoming increasingly more globalized, petitioners with only tenuous connections to the United States increasingly seek the aid of United States courts to resolve their disputes arising out of their business affairs abroad. Thus, resort to *forum non conveniens* doctrine is only going to increase in the future.

Commentators, whether or not they agree with the position of the Third Circuit, uniformly recognize the importance of this issue due to its international implications, as well as its effects on judicial economy: "Questions of

forum non conveniens have long arisen with some regularity in maritime cases and the tremendous growth in international commerce and interdependence since World War II has produced a considerable variety of kinds of cases in which arguably a foreign court would be a more convenient forum." 15 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828, at 280 (2d ed. 1986 & Supp. 2005) (footnote omitted) (noting the split but endorsing the position that a court must ascertain its jurisdiction prior to dismissing on *forum non conveniens* grounds). *See also* David W. Feder, Note, *The Forum Non Conveniens Dismissal in the Absence of Subject-Matter Jurisdiction*, 74 FORDHAM L. REV. 3147, 3186 (2006) ("[A] strict structuring of non-merits issues would serve to frustrate the very flexibility that makes *forum non conveniens* such a valuable tool for judicial consideration of internationally tinged disputes.").[9] *See generally* Jack H. Friedenthal, *The Crack in the Steel Case*, 68 GEO. WASH. L. REV. 258, 269-70 (2000) (noting the importance of jurisdictional sequencing for judicial economy and endorsing a pragmatic approach over "rigidly applied rules of procedure").[10]

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[9] *See also* Ali Razzaghi, Dominguez-Cota v. Cooper Tire & Rubber Co.: *A Convenient Forum for Addressing Subject Matter Jurisdiction*, 74 U. CIN. L. REV. 689, 717 (2005) (This Court's "failure to categorically redefine the limits of the *Steel* rule has effectively opened Pandora's box to the speculating minds of courts and legal scholars. What if the jurisdictional issue is statutory? What if the competing issue is unrelated to the merits but is not personal jurisdiction? Because of these unresolved questions, the Court must reexamine its holdings in *Steel* and *Ruhrgas* and conclusively delineate the specific scope of the jurisdictional issue.").

[10] *See id.* at 269 ("Our courts need to be practical and efficient if they are to carry out their mission of serving the citizenry. . . . One can find within the accepted power of a court to determine its subject-matter jurisdiction, the ability to decide whether it can dismiss cases on

Third, whether it is appropriate to dismiss a suit on *forum non conveniens* grounds without requiring foreign parties to engage in discovery to establish jurisdiction (particularly where, as here, a suit is already proceeding in a foreign forum) directly implicates considerations of international comity. This Court has recognized that international comity is part and parcel of the *forum non conveniens* doctrine. *See, e.g., Am. Dredging Co.*, 510 U.S. at 464-67 (noting that *forum non conveniens* doctrine has been employed historically to ameliorate problems of international comity). And, in recent years, this Court has displayed solicitude to the practices and autonomy of other sovereigns. *See, e.g., Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 S. Ct. 2169, 2178-80 (2005) (noting that, out of considerations of international comity, American law does not apply to the "internal affairs" of foreign-flagged vessels); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004) (relying on comity to hold that Congress did not intend the Sherman Act to apply to foreign conduct that caused foreign injury independent of any domestic effects).[11] At the same time, lower courts, in *forum non conveniens* and other related contexts, have extended due respect to the Chinese judicial system, as the district court here did in expressing its

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preliminary grounds when such dismissals will save time, energy and cost."); *id.* at 270 ("Once we accept the fact that *Steel Co.* and *Ruhrgas* have altered the jurisdictional landscape, the Court should consider broadening its approach even further to allow certain actions to proceed in the federal courts even though subject-matter jurisdiction has been questioned.").

[11] *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004) (refusing to recognize a new cause of action under the Alien Tort Statute for violation of the law of nations in part because of "the potential implications for the foreign relations of the United States . . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.").

"confiden[ce] that the Chinese Admiralty Court can competently and justly handle this matter."[12] App. 67a n.11. The importance of such issues of international comity further counsels in favor of review here.

Fourth and finally, this case is an ideal vehicle for resolving the split among the courts of appeals. Both the majority and the dissent acknowledged the split and carefully analyzed the issue presented. And here, the question is presented in pure form unclouded by other issues, unlike, for example, in *Tyumen Oil Co. v. Norex Petroleum Ltd.*, 05-1070, *cert. denied*, 126 S. Ct. 2320 (2006) (Mem.). There, the Second Circuit did not explicitly rule on the *forum non conveniens* question, did not note the split, and did not even cite *Monegasque*. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146 (2d Cir. 2005). Yet, the petition raised essentially the same *forum non conveniens* question presented here, along with three other mutually interrelated questions. Petition for Writ of Certiorari at i, *Tyumen Oil*

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[12] *See, e.g., Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 144-45 (S.D.N.Y. 2000) (holding, in a choice of law case, that the Court was bound to respect China's choice of public policy, apply Chinese law per New York's interest-based choice of law rules, and reject the argument that Chinese law violated New York public policy); *Lu v. Air China*, No. CV 92-1254 (RR), 1992 WL 453646, at *2 (E.D.N.Y. Dec. 16, 1992) (holding that government ownership of defendant corporation does not undermine the potential for fair resolution of the plaintiff's claim); *BP Chems., Ltd. v. Jiangsu Sopo Corp., Ltd.*, No. 4:99CV323 CDP, 2004 U.S. Dist. LEXIS 27855, at *36 (E.D. Mo. Mar. 29, 2004) (noting that in other cases "China has been found to be an adequate alternative forum"). *See also* Weifang He, *China's Legal Profession: The Nascence and Growing Pains of a Professionalized Legal Class*, 19 COLUM. J. ASIAN L. 138, 150 (2005) ("In fact, rule of law has become a major source of legitimacy for China's current government."); Mei Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 COLUM. J. ASIAN L. 97, 137 (2005) (describing judicial reform in China and noting "particularly impressive" results in Shanghai).

Co. v. Norex Petroleum Ltd. (No. 05-1070), *available at* 2006 WL 431070. By contrast, this petition presents a single issue on which the court below ruled clearly and directly.

Moreover, there is no issue here as to the absence of an alternative forum, a key element of a number of the *forum non conveniens* cases on which the majority relied. *See, e.g.*, App. 23a ("[T]he Seventh Circuit recently vacated a *forum non conveniens* dismissal because the intended alternative forum did not have personal jurisdiction over the defendants. *In re Bridgestone/Firestone [, Inc.]*, 420 F.3d [702,] 705 [(7th Cir. 2005)]."). Here, however, the district court found, and the majority did not dispute, that the highest level of Chinese courts has already resolved any jurisdictional issues in the Chinese action in favor of the Chinese court's jurisdiction over both parties. App. 42a-43a. Thus, the record is clear that Chinese courts, as a result of the Chinese action, present an adequate alternative forum, whose jurisdiction has already been confirmed—and in which the action is *actually* proceeding.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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July 21, 2006

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-1816

MALAYSIA INTERNATIONAL SHIPPING CORPORATION

Appellant

v.

SINOCHEM INTERNATIONAL CO. LTD.

Before: SCIRICA, Chief Judge, SLOVITER, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, STAPLETON* and ALARCÓN**, Circuit Judges

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

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* Honorable Walter K. Stapleton, Senior Judge, is limited to panel rehearing vote only.

** Honorable Arthur L. Alarcón, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation, is limited to panel rehearing vote only.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: March 23, 2006
CMD/cc: Diane B. Carvell
Ann-Michele G. Higgins, Esq.
Stephen M. Hudspeth, Esq.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION
Appellant

v.

SINOCHEM INTERNATIONAL CO. LTD.
No. 04-1815.

United States Court of Appeals, Third Circuit.

Argued June 7, 2005.

Opinion Filed Feb. 7, 2006.

As Amended Feb. 8 and March 23, 2006.

Before AMBRO, STAPLETON and ALARCON, Circuit Judges.

AMBRO, Circuit Judge.

Appellant Malaysia International Shipping Corporation ("MISC") appeals the District Court's dismissal, on *forum non conveniens* grounds, of its fraudulent misrepresentation action against Appellee Sinochem International Company Limited ("Sinochem"). We agree with the District Court that admiralty jurisdiction exists over this case. But because we believe the District Court should have determined whether it had personal jurisdiction before ruling on Sinochem's *forum non conveniens* motion, we vacate and remand.

I. Factual Background & Procedural History

In 2003, Sinochem, a Chinese company, contracted with Triorient Trading Inc. ("Triorient"), an American company that is not a party to this action, for the purchase of a large quantity of steel coils. The coils were required to be loaded for shipment to China by April 30, 2003. Pursuant to the contract, Sinochem opened a letter of credit with its bank in China to provide security to Triorient for the purchase price

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Honorable Arthur L. Alarcón, Senior United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation.

of the coils. To trigger payment under the letter of credit, Triorient was required to submit a valid bill of lading stating that the coils had been loaded on or before April 30, 2003. Sinochem's contract with Triorient specified that any dispute arising under it would be arbitrated under Chinese law.

Triorient sub-chartered a vessel (the M/V HANDY ROSELAND; hereafter the "Vessel") owned by MISC, a Malaysian company, to transport the steel coils to China.[1] Triorient then hired Novolog Bucks County, Inc. ("Novolog"), an American company also not a party to this action, to load the coils onto the Vessel at the Port of Philadelphia. A bill of lading dated April 30, 2003, was issued, acknowledging that the steel coils had been loaded, and the Vessel sailed for China.[2]

The bill of lading listed Triorient as the shipper, Sinochem as the receiver, and Pan Ocean as the carrier. On the back of the bill of lading were "Conditions of Carriage" specifying that the Hague Rules applied to it. This document also incorporated by reference a charter party—a contract between MISC and Pan Ocean regarding the Vessel.[3] The charter party here is not part of the record because Pan Ocean would not disclose its terms. A letter from Pan Ocean's counsel indicated that the charter party chose "New York law with U.S. arbitration" to apply to disputes under it.

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[1] The Vessel was chartered from MISC to Progress Bulk Carriers, which then sub-chartered it to Pan Ocean Shipping Co., Ltd. ("Pan Ocean"), which in turn sub-chartered it to Triorient.

[2] According to MISC's amended complaint, the Vessel docked at the Port of Philadelphia on April 25, 2003, and the loading of the coils began that same day. MISC asserts that the loading of the coils was complete on April 30, 2003, that loading of coils for a different shipper continued on May 1, 2003, and that the Vessel set sail on May 2, 2003.

[3] *Black's* provides a fuller definition. A charter party is "[a] contract by which a ship, or a principal part of it, is leased by the owner, esp. to a merchant for the conveyance of goods on a predetermined voyage to one or more places or for a specified period of time; a special contract between the shipowner and the charterer, esp. for the carriage of goods at sea." *Black's Law Dictionary* 251 (Bryan A. Garner ed., 8th ed.2004).

An opinion of the Chinese court in the related proceeding,[4] however, stated that English law governed disputes under the charter party.

On May 15, 2003, Sinochem filed an action in the Eastern District of Pennsylvania, in which it sought discovery, pursuant to 28 U.S.C. § 1782,[5] regarding various aspects of the Vessel's loading, the charter party, and the bill of lading for use in an "imminent foreign proceeding." The District Court granted this limited discovery.

On June 8, 2003, Sinochem petitioned the Guangzhou Admiralty Court in China (the "Chinese Admiralty Court") for preservation of a maritime claim against MISC and for the arrest of the Vessel when it arrived in China, claiming that MISC had fraudulently backdated the bill of lading to April 30, 2003. The Chinese Admiralty Court ordered the ship arrested that same day. The arrest of the Vessel was then carried out at the Huangpu Port in China. MISC posted security ($9,000,000), and the Vessel was released.

MISC filed the suit before us in the Eastern District of Pennsylvania on June 23, 2003, alleging that, when Sinochem petitioned the Chinese Admiralty Court for the Vessel's arrest, it negligently misrepresented "the [V]essel's fitness and suitability to load its cargo." MISC further alleged that: (1) "[w]ith a minimal amount of investigation, Sinochem knew or otherwise should have known whether its cargo of steel had been loaded aboard the [V]essel on or by April 30, 2003"; (2) "Sinochem knew or should have known that other cargo interests and charterers would reasonably and justifiably rely on Sinochem's representation(s) that the vessel had not loaded the cargo as required"; and (3) MISC had sustained damages "[d]ue to the fraudulent

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[4] The related Chinese proceeding, brought by Sinochem in the Guangzhou Admiralty Court, is discussed below.

[5] The statute provides, in pertinent part, that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. . . ." 28 U.S.C. § 1782(a).

representations made by Sinochem and the resulting delay to the [Vessel] in the People's Republic of China caused by said representations. . . ."

On July 2, 2003, Sinochem filed a complaint with the Chinese Admiralty Court alleging that it had suffered damage due to MISC's alleged backdating of the bill of lading (which had triggered payment by Sinochem to Triorient under the letter of credit's terms). Specifically, Sinochem alleged that May 1, 2003, should have been the loading date on the bill of lading. It asserted that the April 30, 2003 loading date allowed Triorient to negotiate successfully its payment and made it "de facto impossible for [it] to stop payment and refuse acceptance of the goods."

MISC moved to dismiss the Chinese Admiralty Court action on jurisdictional grounds. That Court denied MISC's motion, and the Guangdong Higher People's Court (the "Chinese High Court") affirmed[6] concluding that the Chinese Admiralty Court had jurisdiction.

The Chinese High Court rejected MISC's argument that the choice-of-law provisions of the bill of lading and the charter party controlled the case and that jurisdiction therefore properly rested with the London Maritime Arbitration Commission.[7] In rejecting MISC's contention that the Chinese Admiralty Court should not have exercised jurisdiction because MISC filed its U.S. action before Sinochem filed its Chinese action, the Chinese High Court determined as follows: "Given that the People's Republic of China and the U.S. are different sovereignties with different jurisdictions, whether [MISC] has taken actions at any U.S. court in respect of this case will have no effect on the exercise by a Chinese court of its competent jurisdiction over said case."

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[6] The record suggests that the decision of the Chinese High Court cannot be appealed.

[7] As noted above, there is some confusion in the record whether the charter party called for the application of American or English law to disputes that arose under it.

While these events were occurring in the Chinese courts, proceedings continued in MISC's action in the Eastern District of Pennsylvania. Sinochem filed a motion to dismiss MISC's complaint for lack of subject matter and personal jurisdiction, for *forum non conveniens*, and "for failure to observe the rules of [international] comity." The District Court granted Sinochem's motion to dismiss and later denied MISC's motion for reconsideration.

The District Court determined that it had subject matter jurisdiction over MISC's action pursuant to 28 U.S.C. § 1333 (admiralty and maritime jurisdiction) because the alleged tort—which the District Court identified as the seizure of the Vessel at a port in China—occurred on navigable waters and because the incident had a sufficient connection to maritime activity.

As to personal jurisdiction, the Court concluded that it did not have specific personal jurisdiction over Sinochem under the Pennsylvania long-arm statute. But it did state that, "provided limited discovery, [MISC] might be able to identify sufficient national contacts to establish personal jurisdiction over [Sinochem] through the federal long-arm statute." The Court declined to order such discovery or rule on this issue because it concluded that dismissal was appropriate on the basis of *forum non conveniens*.[8]

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[8] The District Court stated that

> [MISC]'s allegations with respect to other [Sinochem] enterprises in the country, as well as the undisputed facts averred with respect to . . . how the contract was carried out, render [MISC]'s claim [that the Court had personal jurisdiction over Sinochem] far from frivolous. Thus, we would refrain from ruling on whether the federal long-arm statute, Rule 4(k)(2), permits personal jurisdiction over [Sinochem] until after the parties had taken limited jurisdictional discovery. However, as the ensuing analysis shows, this discovery will not be necessary because we will dismiss this matter for forum non conveniens.

Malaysia Int'l Shipping Corp. Berhad v. Sinochem Int'l Co. Ltd., 2004 WL 503541, at *9 (E.D.Pa. Feb. 27, 2004).

In dismissing on *forum non conveniens* grounds, the District Court noted, in the absence of any argument to the contrary by MISC, that an adequate alternative forum for deciding MISC's negligent misrepresentation claim existed in the Chinese Admiralty Court. The District Court then reasoned that the "private interest" factors relevant to its *forum non conveniens* determination (which include, *inter alia*, ease of access to sources of proof and availability of compulsory process to obtain the attendance of unwilling witnesses) weighed in favor of dismissal because the main witnesses were located in China, and the American witnesses would have to travel to China for Sinochem's action regardless whether MISC's action continued in the United States. It reasoned further that the relevant "public interest" factor—the avoidance of unnecessary conflict-of-laws problems—also weighed in favor of dismissal because Chinese law would apply to MISC's negligent misrepresentation claim.[9] In this context and because no American interests were implicated, the Court held that dismissal for *forum non conveniens* was appropriate despite the deference that must be paid to the plaintiff's (in this case MISC's) choice of forum.

The District Court also issued an opinion denying MISC's motion for reconsideration of the dismissal for *forum non conveniens*. In doing so, the Court declined to consider

[9] The District Court rejected MISC's argument that the choice-of-law provisions of the charter party and the bill of lading required the application of American law. The Court noted that the letter from Pan Ocean stating that American law applied to disputes under the charter party did not indicate "whether the charter party call[ed] for U.S. law to apply specifically to this type of negligence matter" and also seemed to be directed specifically at the question of which law would apply to the arrest of the Vessel. The Court determined as well that the bill of lading's choice-of-law provision was not implicated because MISC's negligent misrepresentation claim had nothing to do with the conditions of carriage of the cargo. As the dispute in this case (and the parallel Chinese proceeding) centered on the alleged backdating of the bill of lading that triggered Sinochem's payment to Triorient for the steel coils, the Court concluded that "the choice of law clause more applicable to this matter is that of the purchase contract of the steel coils, which calls for the use of Chinese law."

MISC's assertion that there were additional important witnesses—the people who were retained as surveyors to observe the loading of the Vessel—located in the United States because MISC had failed to establish the connection of those witnesses to this country in responding to the motion to dismiss even though the information was available to MISC at that time. Even if these witnesses were in the United States, the Court pointed out that China had "adequate means" of compelling their testimony. The Court also noted that the Chinese High Court's decision (which was issued after the decision dismissing MISC's action had been filed) affirming Chinese jurisdiction over Sinochem's claim reinforced the District Court's prior conclusion that it could not justify forcing the parties to litigate this case twice. Finally, the District Court reiterated its choice-of-law analysis.

MISC timely appealed the District Court's dismissal of its action, and the propriety of that dismissal is now before us.

II. JURISDICTION

A. *Subject Matter Jurisdiction*

Sinochem argues that subject matter jurisdiction does not exist here. Our review of whether the District Court properly exercised subject matter jurisdiction is plenary. *See, e.g., Levine v. United Healthcare Corp.*, 402 F.3d 156, 161 (3d Cir.2005); *Bracken v. Matgouranis*, 296 F.3d 160, 162 (3d Cir.2002).

As stated earlier, the District Court determined that it had admiralty jurisdiction over this action under 28 U.S.C. § 1333(1). That statute provides, in pertinent part, that "[t]he district courts shall have original jurisdiction . . . of[ ][a]ny civil case of admiralty or maritime jurisdiction. . . ." *Id.* "[A] party seeking to invoke federal admiralty jurisdiction pursuant to . . . § 1333(1) over a tort[10] claim must satisfy

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[10] As an initial matter, MISC contends that we should apply the test for admiralty jurisdiction over contract claims—rather than tort claims—because "[t]he substantive dispute in this case centers around a bill of lading." MISC Ltr. Br. at 3. Although the bill of lading is involved here, MISC did not allege that any of its terms were breached. Rather, MISC

conditions both of location and of connection with maritime activity." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995); *see also Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 179 (3d Cir.1995) (*en banc*) (same). We address the location and connection tests in turn.

1. *The Location Test*

"A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." *Grubart*, 513 U.S. at 534, 115 S.Ct. 1043. The tortious act at issue is Sinochem's alleged misrepresentations to the Chinese Admiralty Court that MISC backdated the bill of lading. Sinochem contends that because (1) these alleged misrepresentations occurred on land and (2) no injury was suffered on land caused by a vessel on navigable water, the location test is not met. We agree with Sinochem as to its second argument, but the resolution of whether the tort here occurred on land or on navigable water is not so clear cut.[11] In determining whether the tort occurred on navigable water, we consider the meaning of "tort" as used in the locality test.[12] In other words, is the tort only the alleged tortious act itself (here, the making of the alleged misrepresentations), or is it the alleged tortious act *as well as* the resulting injury? The Supreme Court has indicated the latter. In *Executive Jet*

(continued...)

alleged that Sinochem *negligently misrepresented* actions MISC took with respect to the bill of lading. That claim is one of tort and has little to do with the provisions of the bill of lading itself. Thus, we analyze whether admiralty jurisdiction exists with reference only to the test for tort claims.

[11] We note that a tort need not have occurred in waters under the jurisdiction of the United States for us to exercise admiralty jurisdiction. *See, e.g., Neely*, 63 F.3d at 170, 179 (finding admiralty jurisdiction over a claim arising out of an accident that occurred in coastal waters off St. Lucia, an independent country).

[12] "Locality," as well as "situs," are used interchangeably with "location" in referring to the test or requirement.

Aviation, Inc. v. *City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), the Court noted that, "[u]nder the locality test, the tort 'occurs' where the alleged negligence took effect. . . ." *Id.* at 266, 93 S.Ct. 493 (describing problems with the traditional location test—which did not require that a connection with maritime activity must exist before admiralty jurisdiction is found). That statement was based on the Court's prior holding that "the whole, or at least the substantial cause of action, arising out of the wrong, *must be complete* within the locality upon which the [admiralty] jurisdiction depends—on the high seas or navigable waters." *The Plymouth*, 70 U.S. (3 Wall.) 20, 36, 18 L.Ed. 125 (1866) (emphasis added).[13]

Our Court has never addressed this issue, but our sister Courts of Appeals that have considered it have adopted what the Fifth Circuit has termed an "'impact' analysis," *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 288 (5th Cir.1989), for determining where a tort occurred under the location test. Under that analysis, the place where a tort occurs is the place where the injury occurs. *See id.* at 588-89 (collecting cases) (holding that admiralty jurisdiction did not exist in a case alleging fraudulent inducement to enter a shipping contract because both the fraudulent inducement

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[13] The application of that rule in *The Plymouth* led to the Court's holding that—when a vessel anchored beside a wharf on the Chicago River caught fire (due to the negligence of those in charge of it) and the flames then spread to the wharf, destroying all the goods stored in the packing-houses there—there was no admiralty jurisdiction because, although the negligence occurred on navigable water, the injury occurred on land. 70 U.S. (3 Wall.) at 36.

The effect of this result was later negated by the Extension of Admiralty Jurisdiction Act, which created the second part of the location test by providing that "the admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." Extension of Admiralty Jurisdiction Act, ch. 526, 62 Stat. 496, 496 (1948). Thus, for a particular class of cases—those with facts similar to *The Plymouth*—Congress has shifted the focus of the location test from where the injury occurred to where the injury was caused.

and the resulting injury occurred on land);[14] *see also Taghadomi v. United States*, 401 F.3d 1080, 1084 (9th Cir. 2005) (rejecting argument that the location test was not satisfied where the Coast Guard's alleged failure to act occurred entirely on land, but the resulting injury occurred on navigable waters, because it "ignore[d] the clear law of [that] circuit that the situs of a tort for the purpose of determining admiralty jurisdiction is the place where the injury occurs"); *Florio v. Olson*, 129 F.3d 678, 680 (1st Cir. 1997) ("In order to satisfy the 'location' or 'situs' requirement, a party must show either that the *injury occurred on navigable water* or that the injury was caused by a *vessel* on navigable water." (first emphasis added)).

This comports with *Executive Jet Aviation* and *The Plymouth* and also with our view of the meaning of "tort" in the context of our case. A tort claim is not complete until both a tortious act and an injury have occurred. Put another way, "negligence, of itself, furnishes no cause of action; it is *dammum absque injuria* [damage without injury]." *The Plymouth*, 70 U.S. (3 Wall.) at 36. Accordingly, we too adopt the rule that, for purposes of the location test, a tort occurs where the alleged tortious act takes effect.

Applying that rule here, we conclude easily that the test is met. The injury resulting from Sinochem's alleged misrepresentations to the Chinese Admiralty Court was the seizure of the Vessel at a port in China. That the seizure

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[14] In *Kuehne & Nagel*, the Fifth Circuit provided several examples of when the location test is met under the "impact analysis," stating:

> This court has applied the "impact" analysis in several situations. We found situs present where a gun was fired from land, but the bullet struck and injured a poacher on a vessel. Situs was also satisfied where the components of a ship's navigational system, negligently manufactured on land, caused a collision on the high seas. And we found the situs element established where workers who contracted asbestosis were exposed to asbestos both on land and on vessels lying in navigable waters.

874 F.2d at 288 (citations omitted).

occurred on navigable waters is undisputed. Thus, the District Court's determination that, "[a]s the seizure occurred on navigable water, at a port in China, [MISC]'s Complaint satisfies the locality prong" is correct. We therefore turn to whether the alleged tort bears a sufficient connection to maritime activity to warrant the exercise of admiralty jurisdiction.

2. *Connection with Maritime Activity Test*

The second prong of the admiralty jurisdiction test for tort claims has two components: (1) "whether the incident involved was of a sort with the potential to disrupt maritime commerce"; and (2) whether there is a substantial relationship to traditional maritime activity, *i.e.*, "whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." *Grubart*, 513 U.S. at 538-40, 115 S.Ct. 1043.

a. *Potential Disruptive Effect on Maritime Commerce*

The District Court concluded that, regardless whether the incident here was characterized as "the improper loading of cargo on a vessel docked at a port on navigable waters or the arrest of a vessel docked in navigable waters," it had a "potentially disruptive impact on maritime commerce." We believe that the incident before us is better characterized as Sinochem's alleged misrepresentations to the Chinese Admiralty Court that led to the arrest of the Vessel at port. Yet, we agree that, no matter how we define the incident, it had the potential to disrupt maritime commerce—and in fact did so, as the alleged misrepresentations resulted in the Vessel's seizure. (And we note that making misrepresentations about another party's conduct with respect to the shipment of goods and a bill of lading is generally likely to disrupt maritime commerce as between those two parties.) Thus, the first component of the connection with maritime activity inquiry is met.

b. *Substantial Relationship to Traditional Maritime Activity.*

"[W]hether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity" is not a concept cabined narrowly or rigidly. *Neely*, 63 F.3d at 179 (internal quotation marks omitted); *see also Sisson v. Ruby*, 497 U.S. 358, 364, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990) ("Our cases have made clear that the relevant 'activity' is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose."). The Supreme Court has held that a "broad perspective" should be used in determining whether the activity underlying a claim has the requisite relationship to maritime activity, and has declined to hold that navigation is the only activity that could satisfy the substantial relationship test. *Sisson*, 497 U.S. at 367, 110 S.Ct. 2892.[15]

The District Court held that, under *Sisson*, the activity in this case met the substantial relationship test because,

> if activities undertaken by vessels have a substantial relationship to maritime activity, it logically follows that activities carried out *to or against* vessels would also have a substantial relationship to maritime activity. As such, the very serious act of arresting a vessel at a port sufficiently relates to maritime activity to establish subject matter jurisdiction.

Malaysia, 2004 WL 503541, at *4 (emphasis in original).

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[15] In *Sisson*, the Court emphasized that

> [t]he fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce, and we have said that that interest cannot be fully vindicated unless *all* operators of vessels on navigable waters are subject to uniform rules of conduct. The need for uniform rules of maritime conduct and liability is not limited to navigation, ***but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial.***

497 U.S. at 367, 110 S.Ct. 2892 (first emphasis in original) (citations and internal quotation marks omitted).

Per *Sisson* and *Neely*, our focus in this inquiry must also include the activity *giving rise* to the seizure of the Vessel. *See Sisson*, 497 U.S. at 364, 110 S.Ct. 2892; *Neely*, 63 F.3d at 179.

As stated earlier, Sinochem's alleged misrepresentations gave rise to the seizure of the Vessel. Looked at narrowly, it may seem that the act of making representations (or misrepresentations, as the case may be) to a court has no connection with maritime activity. But looking at Sinochem's alleged conduct broadly, as we must, it was clearly undertaken with the purpose of having the Vessel seized.[16] Asking a court to have a vessel arrested, as Sinochem did here, is a well-established method of granting an admiralty court power to exercise authority over a ship, *see Reed v. S.S. Yaka*, 307 F.2d 203, 204 (3d Cir.1962), *rev'd on other grounds*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963), and thus has a substantial relationship to traditional maritime activity.[17]

* * * * * *

Because both prongs of the test for determining whether admiralty jurisdiction over a tort claim exists are met here, we now turn to another jurisdiction-related inquiry in this case—the propriety of the District Court's decision to dismiss on *forum non conveniens* grounds without first

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[16] With this statement we do not mean to imply that Sinochem's purpose was not legitimate. That issue, of course, goes to the underlying merits of MISC's fraudulent misrepresentation claim, and the resolution of that claim is not before us.

[17] Finally, we note that the activity here is much closer to the types of activity the Supreme Court has found to satisfy the substantial relationship test than to those it has found to be too attenuated, as those were not even aimed at vessels. *Cf. Grubart*, 513 U.S. at 540, 115 S.Ct. 1043 ("Navigation of boats in navigable waters clearly falls within the substantial relationship, [and] storing them at a marina on navigable waters is close enough, whereas in flying an airplane over the water, as in swimming, the relationship is too attenuated." (citations omitted)).

ascertaining that it had personal jurisdiction over the parties.[18]

B. *Personal Jurisdiction*

As discussed above, the District Court held that it did not have personal jurisdiction over Sinochem under Pennsylvania's long-arm statute but that, with limited jurisdictional discovery, MISC might be able to establish personal jurisdiction over Sinochem based on the federal long-arm statute. MISC contends that the District Court erred by not allowing it this additional discovery, and thus not determining whether personal jurisdiction existed, before dismissing its complaint on the basis of *forum non conveniens.* This issue—whether courts must decide jurisdictional issues, here personal jurisdiction, before ruling on *forum non conveniens*—is one of first impression in our Circuit.[19]

Courts of Appeals have split on the issue. *Compare In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 497-98 (2d Cir.2002) (holding that courts may pass over jurisdictional questions and decide a *forum non conveniens* issue), *and In re Papandreou*, 139 F.3d 247, 255-56 (D.C.Cir.1998) (same), *superseded by statute on other grounds, with Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650, 654 (5th Cir.2005) (*per curiam*) (holding that they may not). These are the three cases most often referred to, but the Seventh and the Ninth Circuits have also reached the same result as the Fifth Circuit's *Dominguez-Cota* opinion. *See*

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[18] As we have determined that admiralty jurisdiction exists, we need not address MISC's contention that federal question and diversity jurisdiction are present here as well. We note that MISC's counsel decided not to press diversity jurisdiction at oral argument—a wise decision, as these alternative arguments rested (at best) on shaky ground.

[19] We note that *forum non conveniens* is a limited doctrine, typically applying when the alternative forum is in a foreign country or a state court. 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3828, at 278-80 (2d ed. 1986). This is because 28 U.S.C. § 1404(a) covers inconvenient forum issues within the federal court system. *Id.*

Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir.2001), *aff'd in part, cert. dismissed in part*, 538 U.S. 468, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003); *Kamel v. Hill-Rom Co.*, 108 F.3d 799 (7th Cir. 1997).

We tackle our analysis in two parts. First, we decide whether *forum non conveniens* is a non-merits grounds for dismissal. Second, we decide whether a district court must establish both subject matter jurisdiction and personal jurisdiction before ruling on a *forum non conveniens* issue.

1. *Is Forum Non Conveniens Merits Related?*

The Supreme Court has held that courts may not assume "hypothetical jurisdiction" to resolve a case on the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). In other words, an actual determination must be made whether subject matter jurisdiction exists before a court may turn to the merits of a case. The Court later concluded that this principle applied equally to personal jurisdiction because "[p]ersonal jurisdiction, too, is an essential element of the jurisdiction of a district . . . court, without which the court is powerless to proceed to an adjudication." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (ellipsis in original) (internal quotation marks omitted). The Court held, however, that the existence of subject matter jurisdiction need not be decided before personal jurisdiction, stating that "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 585, 119 S.Ct. 1563. While *Steel Co.* required rulings on subject matter jurisdiction before rulings on the merits, the *Ruhrgas* Court held that it did not "dictate a sequencing of jurisdictional issues." *Id.* at 584, 119 S.Ct. 1563. In other words, a dismissal on "non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying [*Steel Co.*]" *Id.* at 584-85, 119 S.Ct. 1563 (quoting *In re Papandreou*, 139 F.3d at 255) (omission in original).

In the wake of *Steel Co.* and *Ruhrgas*, one commentator posits that there are three categories of issues, only two of which have set decisional priorities. *See* Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 Vand. L.Rev. 235, 321 (1999). The first category includes jurisdictional issues that "cannot be bypassed" because Article III of our Constitution requires that they be addressed; the second deals with merits-related issues, which "cannot be reached without first verifying jurisdiction." *Id.* The third category fits somewhere between these first two. It comprises two subgroups of issues: (1) jurisdictional issues that do not have to be reached before the merits and (2) "issues that are neither jurisdictional nor merits-related." *Id.* at 322, 321-22. This first subgroup includes non-Article III jurisdictional issues like statutory standing. *Id.* at 322 n. 361; *see also id.* at 297-99. The second subgroup includes "procedural, remedial, or evidentiary" issues. *Id.* at 322 n. 364.

Within this framework, *forum non conveniens* is not a constitutional Article III jurisdictional issue, so we address whether it fits within the second or the third category. The D.C. Circuit—in a pre-*Ruhrgas* case—reasoned that what *Steel Co.* put "beyond the power of courts lacking jurisdiction [was] adjudication on the merits, the act of deciding the case," so that courts could still dismiss cases on "other non-merits grounds such as forum non conveniens and personal jurisdiction." *In re Papandreou*, 139 F.3d at 255. Accordingly, it held that *forum non conveniens* was "as merits-free as a finding of no jurisdiction." *Id.*

But the Fifth Circuit reached the opposite conclusion. It held that it could not "characterize forum non conveniens as a 'non-merits' issue akin to personal jurisdiction." *Dominguez-Cota*, 396 F.3d at 654. We disagree, as we believe that *forum non conveniens* is a non-merits ground for dismissal.

The Fifth Circuit based its holding on two cases, a Supreme Court case—*Van Cauwenberghe v. Biard*, 486 U.S. 517, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988)—and a 1986

Fifth Circuit case—*Partrederiet Treasure Saga v. Joy Manufacturing Co.*, 804 F.2d 308 (5th Cir.1986). *See Dominguez-Cota*, 396 F.3d at 653 (citing *Biard* and *Partrederiet*). These two cases concern on their face whether *forum non conveniens* falls within the collateral-order doctrine (which allows otherwise non-final orders to be "immediately appealable under § 1291," *Biard*, 486 U.S. at 527, 108 S.Ct. 1945). One of the elements of the collateral-order doctrine is a requirement that the order be "completely separate from the merits." *Id.* The Supreme Court (and the Fifth Circuit) both determined that, "in assessing a *forum non conveniens* motion, the district court generally becomes entangled in the merits of the underlying dispute." *Id.* at 528, 108 S.Ct. 1945; *see also Partrederiet*, 804 F.2d at 310 (same).

These cases are telling, to be sure, but not dispositive, for four reasons. First, in a context other than the collateral-order doctrine, both the Supreme Court and the Fifth Circuit have held *forum non conveniens* dismissals not to be rulings on the merits. In a case decided less than a month before *Biard*, the Supreme Court discussed the Anti-Injunction Act in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). It held that the "District Court did not resolve the merits of [petitioner's] claim.... Rather, the only issue decided by the District Court was that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine." *Id.* at 148, 108 S.Ct. 1684. In a 2003 opinion citing *Chick Kam Choo* and discussing the Anti-Injunction Act and claim preclusion, the Fifth Circuit held that an "f.n.c. [*forum non conveniens*] dismissal ... does not resolve the substantive merits." *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 677 (5th Cir.2003). Instead, "[t]he principle of f.n.c .... contemplates resolving the merits in another forum." *Id.* at 679. The *Vasquez* Court also held that a dismissal under *forum non conveniens* could be construed as a Federal Rule of Civil Procedure 41(b) dismissal for lack of jurisdiction or improper venue—*i.e.*, not a dismissal on the merits. *Id.* at 678.

Second, we have before discussed *Biard* and, in that context, minimized the entanglement it mentions between the merits and *forum non conveniens*. Although a "district court must immerse itself to a certain degree in the facts of the case. . . ., [it] must do no more than delineate the likely contours of the case by ascertaining, among other things, the nature of the plaintiff's action, the existence of any potential defenses, and the essential sources of proof." *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 181 (3d Cir.1991). We further noted that "[n]othing in [*Biard*] . . . directs a court to assess the relative strength of the parties' arguments and to select one paramount issue." *Id.* at 182. Thus, an entanglement in the facts does not suffice to make *forum non conveniens* grounds a merits-related issue.

Third, also following from the first reason, language in the Supreme Court's 1994 *American Dredging* opinion suggests that *forum non conveniens* is not a merits-based issue, but simply a procedural one. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994) (noting that "the doctrine is one of procedure rather than substance"); *see also id.* at 454 n.4, 114 S.Ct. 981 (stating that "*forum non conveniens* is not a substantive right of the parties, but a procedural rule of the forum"). In doing so, it equated *forum non conveniens* with venue: "At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision. . . . But venue is a matter that goes to process rather than substantive rights—determining which among various competent courts will decide the case." *Id.* at 453, 114 S.Ct. 981. The Court further distinguished *forum non conveniens* from other issues. "Unlike burden of proof . . . and affirmative defenses such as contributory negligence . . ., *forum non conveniens* does not bear upon the substantive right to recover. . . ." *Id.* at 454, 114 S.Ct. 981.

Fourth, that *forum non conveniens* is not merits based has the most support at the federal appellate level. The First Circuit also agrees with this notion. Mentioning *Papandreou*, it discussed the defendants' "non-merits-based defenses . . . (including insufficiency of process, forum non

conveniens, and lack of in personam jurisdiction)." *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 294 (1st Cir.2005). We therefore join three (First Circuit, Second Circuit, *see Monegasque*, 311 F.3d at 498, and D.C. Circuit, *see Papandreou*, 139 F.3d at 255) of the four Circuits to have weighed in on the issue, and part with the Fifth Circuit.

This background demonstrates that *forum non conveniens* is squarely in the third category of issues discussed above. Neither a constitutional Article III jurisdictional issue nor a substantive, merits-related issue, *forum non conveniens* is a non-jurisdictional, non-merits procedural issue. We next decide whether jurisdiction must be determined before *forum non conveniens*.

2. *Can a Court Decide Forum Non Conveniens Before Establishing Jurisdiction?*

Should the District Court have determined whether jurisdiction existed before dismissing on *forum non conveniens* grounds? We hold yes for two reasons.

First, the very nature and definition of *forum non conveniens* presumes that the court deciding this issue has valid jurisdiction (both subject matter and personal jurisdiction) and venue. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) ("[T]he doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction[20] or mistake of venue."), *superseded by statute on other grounds*. Through *forum non conveniens*,

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[20] We admit that it is not facially apparent that the *Gulf Oil* Court was referring to both subject matter and personal jurisdiction when it said "jurisdiction." The Court has before noted that "[j]urisdiction . . . is a word of many, too many, meanings." *Steel Co.*, 523 U.S. at 90, 118 S.Ct. 1003 (internal quotation marks omitted). But three paragraphs before the line quoted above from *Gulf Oil*, the Court discussed the alternative forum desired by the defendant and noted that the state and federal courts there were "able to obtain jurisdiction of the defendant." *Gulf Oil*, 330 U.S. at 503, 67 S.Ct. 839. This almost certainly alludes to personal jurisdiction. The Supreme Court also noted that *forum non conveniens* "presupposes" that the court deciding the issue is one in which the "defendant is amenable to process." *Id.* at 507, 67 S.Ct. 839. This also refers to personal jurisdiction.

a district court "may decline to exercise its jurisdiction, *even though the court has jurisdiction and venue*, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum." *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 828 (5th Cir.1993) (emphasis added); *see also Am. Dredging*, 510 U.S. at 447-48, 114 S.Ct. 981 (same); *Altmann v. Republic of Austria*, 317 F.3d 954, 972 (9th Cir.2002) (same); *Rustal Trading US, Inc. v. Makki*, 17 Fed.Appx. 331, 335 (6th Cir.2001) (unpublished) (same); *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 947 (1st Cir.1991) (Breyer, C.J.) (same). Stated differently, but with the same requirement of jurisdiction, we have held that the ultimate inquiry of *forum non conveniens* "is whether the retention of jurisdiction by the district court would best serve the convenience of the parties and the ends of justice." *Mobil Tankers Co., S.A. v. Mene Grande Oil Co.*, 363 F.2d 611, 613 (3d Cir.1966); *see also Hoffman v. Goberman*, 420 F.2d 423, 426 (3d Cir.1970) (same).

–*Forum non conveniens* allows a court (with jurisdiction and proper venue) to decline the exercise of its jurisdiction in favor of letting another court (also with jurisdiction and venue) hear the case. In this way, jurisdiction—both subject matter and personal jurisdiction—is a *sine qua non* for *forum non conveniens*. *See, e.g., Gulf Oil*, 330 U.S. at 506-07, 67 S.Ct. 839 ("In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."); *In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 704 (7th Cir.2005) (discussing the need for an alternative forum with jurisdiction and stating "it is tough to argue that the present forum [*i.e.*, the one deciding the *forum non conveniens* motion]—which by definition has both subject matter jurisdiction and personal jurisdiction over all parties—is 'out of all proportion to plaintiff's convenience,' when the plaintiff has no other options"); *Black's Law Dictionary* 680 (Bryan A. Garner ed., 8th ed.2004) (defining *forum non conveniens* as the "doctrine that an appropriate forum—even

though competent under the law—may divest itself of jurisdiction if . . . it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place"); Jack H. Friedenthal *et al.*, *Civil Procedure* § 2.17, at 91-92 (4th ed.2005) (noting that *forum non conveniens* "permits a court having jurisdiction over an action to refuse to exercise its jurisdiction when the litigation could be brought more appropriately in another forum," and stating that "[i]t must appear that jurisdiction over all parties can be secured and that complete relief can be obtained in the supposedly more convenient court"); 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3828, at 287 (2d ed. 1986) ("The doctrine of *forum non conveniens* does not come into play unless the court in which the action was brought has both subject matter and personal jurisdiction and is a proper venue. If the case is wanting in any of these respects, the action should be dismissed on that ground without reaching questions of *forum non conveniens*." (footnote omitted)). The need for jurisdiction in both forums (the forum deciding the *forum non conveniens* issue and the alternative forum) is so important that the Seventh Circuit recently vacated a *forum non conveniens* dismissal because the intended alternative forum did not have personal jurisdiction over the defendants. *In re Bridgestone/Firestone*, 420 F.3d at 705.

Second, at least two other Circuit Courts, and the Supreme Court (inferentially), have determined that *forum non conveniens* dismissals are invalid if the district court does not have subject matter jurisdiction. The Seventh Circuit in *Kamel* affirmed the District Court's *forum non conveniens* dismissal. *Kamel*, 108 F.3d at 806. But one of the parties, Chedid, was an American expatriate with a Saudi Arabian domicile; his expatriate status destroyed complete diversity under 28 U.S.C. § 1332(a). *Id.* at 805. Therefore, the Seventh Circuit held, the District Court "lacked jurisdiction to rule on [the defendant's] *forum non conveniens* motion because Chedid was a party to this action." *Id.* Because appellate courts have the power to dismiss dispensable

parties to salvage diversity jurisdiction, the Court dismissed Chedid "to attain subject matter jurisdiction to affirm [the] *forum non conveniens* dismissal." *Id.* at 806. By so doing, it made clear that *forum non conveniens* dismissals are of no effect unless the district courts have jurisdiction. Only by dismissing Chedid and restoring jurisdiction by fiat could the Circuit Court there deal with the *forum non conveniens* dismissal.

Likewise, in 2001 the Ninth Circuit reversed a *forum non conveniens* dismissal because the District Court lacked subject matter jurisdiction. *See Patrickson*, 251 F.3d at 800 n.3 ("As the district court recognized, such claims may raise serious questions of forum non conveniens under federal and state law. Of course, the federal courts may decide that issue only if we have jurisdiction over the case."). The District Court had dismissed some class action cases for *forum non conveniens*, *id.* at 798, but the Ninth Circuit held that the District Court had no federal subject matter jurisdiction, *id.* at 808. Accordingly, the Court reversed the District Court's judgment and remanded the case with instructions to remand it to a state court. *Id.* at 808-09. The Supreme Court agreed that there was no subject matter jurisdiction and affirmed the Ninth Circuit's reversal of the *forum non conveniens* dismissal. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003).

At least one District Court within our Circuit has also followed this approach in the context of personal jurisdiction. *Henkel Corp. v. Degremont, S.A.*, 136 F.R.D. 88 (E.D.Pa.1991), held, in a case where discovery on issues of personal jurisdiction was ongoing, that the defendants' *forum non conveniens* motion could not be decided because the Court had "not determined whether [it had] jurisdiction over the parties." *Id.* at 98.

What of the cases holding otherwise? The Second Circuit's *Monegasque* opinion ignores the nature of *forum non conveniens* and the cases cited above by clinging to the principle of hypothetical jurisdiction. *See Monegasque*, 311 F.3d at 497. First, in the face of the Supreme Court's

disapproval of this principle in *Steel Co.*, it claims to retain hypothetical jurisdiction unless the "potential lack of jurisdiction is a constitutional question." *Id.* (internal quotation marks omitted). It then avoids further analysis by quoting liberally from the D.C. Circuit's *Papandreou* opinion. *See id.* at 498.

Papandreou states that *forum non conveniens* "does not raise a jurisdictional bar but instead involves a deliberate abstention from the exercise of jurisdiction." *In re Papandreou*, 139 F.3d at 255. As a court can only abstain from jurisdiction it already has, if it has no jurisdiction *ipso facto* it cannot abstain from the exercise of it. The *Papandreou* Court appears to concede as much when it mentions that "abstention may appear logically to rest on an assumption of jurisdiction. . . ." *Id.* And again it exposes the weakness of its position in a footnote, where it admits that "[a]ny such *forum non conveniens* dismissal [*i.e.*, one decided without first establishing jurisdiction] could not, however, be subject to conditions,[21] *e.g.*, a condition that

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[21] A conditional dismissal is one in which "the district court dismisses the case only if the defendant waives jurisdiction and limitations defenses, and only if it turns out that another court ultimately exercises jurisdiction over the case." *Ford v. Brown*, 319 F.3d 1302, 1310 (11th Cir.2003). This allows the district court to "reassert jurisdiction in the event that the foreign court refuses to entertain the suit." *Id.* Conditional dismissals provide protection to plaintiffs by ensuring that an adequate alternative forum will exist. *See, e.g., Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pak.*, 273 F.3d 241, 248 (2d Cir.2001); *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1352 (1st Cir.1992); *Pain v. United Techs. Corp.*, 637 F.2d 775, 794 (D.C.Cir.1980), *overruled on other grounds by Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981); *cf.* Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of* Forum Non Conveniens *in the United States, the United Kingdom, and Germany*, 16 Loy. L.A. Int'l & Comp. L.J. 455, 473-74 (1994) (discussing the use of conditional dismissals to prevent injustice to the non-movant but noting that dismissals are still practically outcome determinative). If a court is not able to grant a conditional dismissal, the plaintiff could find itself without any guaranteed forum. Moreover, if that plaintiff comes back to the transferring forum to refile, and the transferring forum subsequently finds that it has no jurisdiction over the suit, the judicial economy claimed by

defendants promise to submit to the jurisdiction of another court, for exaction of such a condition would appear inescapably to constitute an exercise of jurisdiction." *Id.* at 256 n.6.

We go a more certain way. District courts either have jurisdiction to decide *forum non conveniens* motions or they do not. As such, we hold that they must have jurisdiction before they can rule on which forum, otherwise available, is more convenient to decide the merits.

We do not reach this holding without some regret, as we would like to leave district courts with another arrow in their dismissal quivers. Also, we recognize that this result may not seem to comport with the general interests of judicial economy and may, in this case, ultimately result in a waste of resources if the case is again dismissed before the substance of MISC's claim is decided. But precedent, logic, and the very terms of the *forum non conveniens* doctrine dictate this result. If the Supreme Court wishes otherwise, we leave that determination to it. For now, it tells us, "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Steel Co.*, 523 U.S. at 101, 118 S.Ct. 1003. Without jurisdiction over subject matter and parties, we are pundits, hardly an optimal calling for appellate courts.

Here we have already decided subject matter jurisdiction, but we must take our inquiry one step further. We must decide whether the District Court has adequately addressed personal jurisdiction.

3. *Did the District Court Adequately Address Personal Jurisdiction?*

Sinochem urges that, regardless of the discussion above, we should nonetheless conclude that the District Court

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(continued...)

proponents of the "*forum non conveniens* without jurisdiction" dismissal ceases to exist.

adequately addressed personal jurisdiction before moving to its *forum non conveniens* analysis, contending that the District Court determined that MISC had made a *prima facie* showing of personal jurisdiction. When a defendant raises the possible lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that it exists and "present[ing] a *prima facie* case for the exercise of personal jurisdiction by establishing with reasonable particularity sufficient contacts between the defendant and the forum state." *Mellon Bank (E.) PSFS, Nat'l Ass'n v. Farino*, 960 F.2d 1217, 1223 (3d Cir.1992) (internal quotation marks omitted). Here, with regard to the potential existence of personal jurisdiction over Sinochem under the federal long-arm statute, the District Court stated only that MISC's "allegations with respect to [Sinochem] enterprises in this country, as well as undisputed facts averred with respect to how the contract was carried out, render [MISC]'s claim far from frivolous."

This general statement does not indicate that MISC met its burden of establishing sufficient contacts with "reasonable particularity." Rather, it points out only the possibility that MISC *might* be able to do so and that there were some facts that supported MISC's claim. Consequently, we hold that the District Court's general statement as to the possibility that personal jurisdiction might exist did not determine whether MISC has made a *prima facie* case for personal jurisdiction, let alone constitute an ultimate conclusion that it did exist.[22] *See Mellon Bank*, 960 F.2d at 1226 (citing *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 150 (3d Cir.1992)). We therefore remand this case for a decision on personal jurisdiction (and, of course, whatever jurisdictional discovery may be necessary for such a decision).[23]

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[22] There was no waiver of personal jurisdiction in this case, but such a waiver could substitute for the Court's determination on personal jurisdiction. *See Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).

[23] Given this conclusion, we express no opinion regarding MISC's argument that the District Court abused its discretion in dismissing its complaint on the basis of *forum non conveniens*.

III. Response to the Dissent

Our colleague has filed a thoughtful dissent with several plausible arguments. To stem any confusion, we respond to those arguments.

1. The dissent argues that our holding "subverts a primary purpose of the doctrine of *forum non conveniens*," defining (without citation) that primary purpose as "protect[ing] a defendant from being compelled to litigate in a forum where it will have to shoulder the burden of substantial and unnecessary effort and expense." This overdramatizes the doctrine, as most litigation involves unwanted effort and expense for the defendant. The doctrine's purpose has elsewhere been described as a district court—with jurisdiction and venue—declining to exercise that jurisdiction "when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum." 17 James Wm. Moore, *Moore's Federal Practice* § 111.70, at 111-208 (3d ed.2005) (internal quotation marks omitted); *see also* Friedenthal *et al.*, *supra*, § 2.17, at 91 (noting that "a correct, but inconvenient, tribunal" may refuse to exercise its jurisdiction when "the forum may have little to no connection with the significant events forming the basis of the lawsuit" or when "the litigation could be brought more appropriately in another forum"). Our holding coincides with this purpose; it ensures that both forums are proper and allows for choice between them.

2. The dissent quotes *Ruhrgas* for the proposition that the rejection of hypothetical jurisdiction is not pertinent here:

> "[A] court that dismisses on . . . non-merits grounds . . . before finding subject-matter jurisdiction, [however] makes no assumption of law-declaring power that violates the separation of powers principles underlying . . . . *Steel Company.*"

(alterations and omissions in original).

This quotation suggests that a district court's dismissal on non-merits grounds of any type does not violate the

prohibition against hypothetical jurisdiction. But while the first omission in the quotation was as it appeared in *Ruhrgas*, the second one obscures the fact that the Supreme Court restricted its statement to "'non-merits grounds such as . . . personal jurisdiction,'" *Ruhrgas*, 526 U.S. at 584, 119 S.Ct. 1563 (omission in original). We held in section II.B.1 above that *forum non conveniens* was a non-merits issue, but of a different type from personal jurisdiction—a holding the dissent does not dispute. Thus, we do not agree that *Ruhrgas* makes the principle of hypothetical jurisdiction inapplicable in this context.

3. We are faulted for recognizing that our holding may not always result in the most streamlined procedure. But the dissent does not comment on our concerns in footnote 21, above, that the opposite holding could also result in a waste of resources. We are not willing to sacrifice the correct result for an occasional gain in judicial economy.

4. The dissent ignores our citations to the Supreme Court, the Seventh Circuit, and two treatises by claiming that our "only rationale" is based on *Black's Law Dictionary*. We cite *Black's*, but our reasoning is also based on—among other sources—*Gulf Oil*'s statement that *forum non conveniens* in all cases "presupposes at least two forums in which the defendant is amenable to process," 330 U.S. at 507, 67 S.Ct. 839, and the Seventh Circuit's statement that *forum non conveniens* "by definition" contemplates that the forum deciding the motion "has both subject matter jurisdiction and personal jurisdiction over all parties," *In re Bridgestone/Firestone*, 420 F.3d at 704.

5. Our colleague acknowledges that the Seventh Circuit's *Kamel* case supports our result, but cannot distinguish it away. The dissent's only quibble with the case is apparently *Kamel*'s lack of citation or explanation, but that does not prevent us from joining the Seventh Circuit on this issue. The dissent also ignores the Seventh Circuit's reiteration of *Kamel*'s principles in its 2005 *In re Bridgestone/Firestone* case quoted above.

6. The dissent restricts *Gulf Oil* to holding "only that where the 'principle of *forum non conveniens* [applies] a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.'" (quoting *Gulf Oil*, 330 U.S. at 507, 67 S.Ct. 839) (alteration in original). This ignores the immediately preceding sentence in the *Gulf Oil* opinion, the one quoted above that *forum non conveniens* "presupposes at least two forums in which the defendant is amenable to process," *Gulf Oil*, 330 U.S. at 507, 67 S.Ct. 839; *see also id.* at 504, 67 S.Ct. 839 (noting that "the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue").

7. Our citation to the Ninth Circuit's *Patrickson* case is criticized as "inapposite." We agree that the Supreme Court did not explicitly discuss its affirmance of the Ninth Circuit's reversal of the *forum non conveniens* dismissal for a lack of subject matter jurisdiction. But as Nixon's attorney general John Mitchell said, in his oft-misquoted phrase, "You'd be better informed if instead of listening to what we say, you watch what we do." *The Oxford Dictionary of American Legal Quotations* 254 (Fred R. Shapiro ed., 1993). What the Court did speaks louder than its lack of discussion about it.

8. The dissent concedes that the Supreme Court stated that *forum non conveniens* "'can never apply'" without jurisdiction, but then claims that courts may abstain from exercising their jurisdiction without first checking to see if they have it. In other words, our colleague believes that a court can rule on *forum non conveniens*—which requires jurisdiction—just so long as it pretends that it has jurisdiction. But if a court suspects that it does not have personal jurisdiction over the parties, can it still dismiss for *forum non conveniens*? What if that court knows for certain that it does not have personal jurisdiction? We cannot tell how far the dissent's principle of willing blindness goes, but we decline to allow courts to exercise this legal fiction when ruling on a doctrine that depends by definition on the courts' having jurisdiction.

9. Last, the dissent claims that, while "it is important to determine whether the allegedly more convenient forum has jurisdiction to entertain the suit, there is no utility in, and no doctrinal necessity for, insisting that the present forum determine its own jurisdiction before dismissing." But this is certainly incorrect. The D.C. Circuit admitted as much in *Papandreou*. *Cf.* 139 F.3d at 256 n.6. It recognized that district courts without jurisdiction may not grant conditional dismissals on *forum non conveniens* grounds. Therefore, while district courts can "determine" whether the alternative forum has jurisdiction, they cannot make their decision stick under the dissent's reasoning. The usefulness of and necessity for our holding are that it grants district courts plenary power to deal with the consequences of their *forum non conveniens* dismissals. Not only can courts dismiss cases once their jurisdiction is established, but they can also enforce those dismissals and protect the non-moving parties in those cases.

In sum, we appreciate the dissent's arguments, but we remain unpersuaded and unchanged in our conviction that *forum non conveniens*, by its very terms, requires courts beforehand to ascertain and have subject matter jurisdiction and personal jurisdiction.[24]

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There is a difference between the typical "hypothetical jurisdiction" scenario contemplated in *Ruhrgas* and the situation we face. In *Ruhrgas*, the choice was basically between (a) dismissing based on personal jurisdiction and (b) reaching (and possibly finding) subject matter jurisdiction and then dismissing based on personal jurisdiction. *See Ruhrgas*, 526 U.S. at 588, 119 S.Ct. 1563. Here, the choice is between (a) dismissing for *forum non conveniens* or (b) reaching personal jurisdiction and either (i) dismissing based on the lack of it or (ii) finding personal jurisdiction and dismissing for *forum non conveniens*.

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[24] Proper venue, while not dealt with directly in this case, is of course also required, though, like personal jurisdiction, it too can be waived. 15 Wright, Miller & Cooper, *supra*, § 3828, at 287, § 3829, at 309.

Two characteristics make the two situations different. First, subject matter jurisdiction and personal jurisdiction are two of the prerequisites for litigation to proceed, but they are separate inquiries. Thus, it is no surprise that *Ruhrgas* leaves it up to the court to decide first whichever one it wants—there is no necessary order of decision. But *forum non conveniens* by definition requires two otherwise proper forums with both subject matter jurisdiction and personal jurisdiction. In this light, subject matter jurisdiction and personal jurisdiction are simply two of the horses to which the litigation cart is harnessed. Deciding *forum non conveniens* before jurisdiction puts the cart before the horses.

Second, a court following *Ruhrgas* can dismiss with the certainty that the case is not properly before it. Whether the case is deficient on subject matter jurisdiction or personal jurisdiction, the court cannot decide the merits. A case dismissed for *forum non conveniens*, on the other hand, is not faulty—by definition. It is a case properly before the court to determine the merits, although it is simply more convenient to do so elsewhere. But if a court were to dismiss a case for *forum non conveniens* without ascertaining jurisdiction (whether subject matter or personal), it could not enforce sending the case to the alternative forum. *Papandreou*, 139 F.3d at 256 n.6.

IV. Conclusion

The District Court correctly determined that subject matter (here admiralty) jurisdiction exists because the injury resulting from Sinochem's alleged misrepresentations occurred on navigable waters and because the activity giving rise to MISC's claim had the requisite connection with maritime activity. But the Court should have ascertained all aspects of its jurisdiction—including personal jurisdiction—before engaging in a *forum non conveniens* analysis. We therefore vacate and remand this case to the District Court for a determination of whether personal jurisdiction exists.

STAPLETON, Circuit Judge, Dissenting.

In essence, this matter involves a claim that Sinochem committed fraud on the Chinese court in the course of

securing an arrest of the vessel, and the District Court did not abuse its discretion in determining that a balancing of the relevant private and public factors counseled abstention in favor of that court. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). Accordingly, I would affirm the order of the District Court.

Our Court today mandates that the District Court subject Sinochem to discovery and other proceedings in a forum which the District Court rightly regards as inappropriate. That mandate subverts a primary purpose of the doctrine of *forum non conveniens*. That doctrine is intended to protect a defendant from being compelled to litigate in a forum where it will have to shoulder the burden of substantial and unnecessary effort and expense. A doctrine having this objective should not be applied in a manner that imposes a substantial and unnecessary litigation burden on the defendant, absent some important countervailing consideration. The only countervailing consideration identified by Malaysia is the doctrine that courts without subject matter jurisdiction and personal jurisdiction over the defendant are powerless to adjudicate a case or controversy. While this is a valid and fundamental proposition, it does not dictate that the District Court conduct discovery and rule upon its personal jurisdiction over Sinochem before abstaining in favor of a far more appropriate forum.

A court may not assume that it has jurisdiction and then proceed to adjudicate the claim before it. The Supreme Court rejected such a "hypothetical jurisdiction" approach in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), "because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." The Supreme Court has made clear, however, that this principle is inapposite here:

> "[A] court that dismisses on . . . non-merits grounds . . . before finding subject-matter jurisdiction, [however] makes no assumption of law-declaring power that violates the separation of powers principles underlying . . . *Steel*

> *Company.*" *In re Papandreou*, 139 F.3d 247, 255 (C.A.D.C.1998). It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits. Thus, as the Court observed in *Steel Co.*, district courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction, see *Moor v. County of Alameda*, 411 U.S. 693, 715-716, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), or abstain under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), without deciding whether the parties present a case or controversy, *see Ellis v. Dyson*, 421 U.S. 426, 433-434, 95 S.Ct. 1691, 44 L.Ed.2d 274 (1975).

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584-85, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999).

My colleagues candidly acknowledge that the *forum non conveniens* doctrine presents "non merits issues" for the purpose of applying *Steel Co.* and *Ruhrgas*. They also concede that the result they reach "may not seem to comport with the general interests of judicial economy and may, in this case, ultimately result in a waste of resources." Op. at 35. Moreover, they are able to cite only one case—*Kamel v. Hill-Rom Co.*, 108 F.3d 799 (7th Cir.1997)[25]—that arguably requires the result the Court here reaches.[26]

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[25] In *Kamel*, the District Court dismissed on grounds of *forum non conveniens* and the Court of Appeals agreed with that determination and affirmed. The Court of Appeals also found, however, that, while the complaint alleged complete diversity, there was a non-diverse party, and that the District Court, accordingly, had "lacked [subject matter] jurisdiction to rule on [the] *forum non conveniens* motion." 108 F.3d at 805. The Court held that it was authorized by Fed. R. Civ. Proc. 2, as construed in *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989), to dismiss the non-diverse dispensable party. It did not cite precedent for or explain either (a) its finding that the District Court was not authorized to rule on the *forum non conveniens* motion, or (b) its apparent conclusion that dismissal of the non-diverse party was a prerequisite to an affirmance.

[26] The other Supreme Court and Court of Appeals precedents relied upon by the Court are inapposite. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501,

The only rationale tendered for the Court's result is its assertion, based on *Black's Law Dictionary*, that "*forum non conveniens* is the voluntary transfer of a case from one legally competent court to another for reasons of convenience." From this generalization, the Court concludes that a "court cannot give away something it has no right to have in the first place." I am unpersuaded.

A court with jurisdiction normally has an obligation to exercise it. The *forum non conveniens* doctrine is an exception to this rule. That doctrine authorizes a court to decide not to exercise jurisdiction which it possesses, authority that by definition is unnecessary in the absence of jurisdiction. In this limited sense, it is true that "the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction." *Gulf Oil*, 330 U.S. at 504, 67 S.Ct. 839. It does not follow, however, that a court may not decide to abstain from exercising any jurisdiction it may have without

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(continued...)

507, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), holds only that where the "principle of *forum non conveniens* [applies] a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir.2001), *aff'd*, 538 U.S. 468, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003), was a case removed from state court in which the District Court determined that it had removal jurisdiction and thereafter dismissed on grounds of *forum non conveniens*. The Court of Appeals concluded that the District Court did not have removal jurisdiction and remanded with instructions that the case be sent back to state court. The Supreme Court agreed that the District Court was without jurisdiction, making no comment regarding the relief afforded by the Circuit Court judgment. No issue here relevant was argued before the Court of Appeals. While not discussed by the Court of Appeals, the issue presented by the case was whether in an improperly removed case the District Court or the state court should resolve a *forum non conveniens* issue. Given the comity considerations, it clearly should be the latter, a result that is, in any event, dictated by 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."). As my colleagues concede, *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir.2005), is based on the faulty premise that *forum non conveniens* presents merits issues.

affirmatively determining the boundaries of its jurisdiction.[27] While, for obvious reasons, it is important to determine whether the allegedly more convenient forum has jurisdiction to entertain the suit, there is no utility in, and no doctrinal necessity for, insisting that the present forum determine its own jurisdiction before dismissing.

In short, a court "makes no assumption of law declaring power" when it decides not to exercise whatever jurisdiction it may have. *Ruhrgas*, 526 U.S. at 584, 119 S.Ct. 1563 (quoting *In re Papandreou*, 139 F.3d at 255). This means that a district court may dismiss on *forum non conveniens* grounds without first determining its own jurisdiction. *In re Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488 (2d Cir.2002); *In re Papandreou*, 139 F.3d 247 (D.C.Cir.1998). I would affirm.

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[27] As the Court of Appeals for the District of Columbia explained in *In re Papandreou*, 139 F.3d 247, 255-56 (D.C.Cir.1998) (citations and footnote omitted):

> *Forum non conveniens* does not raise a jurisdictional bar but instead involves a deliberate abstention from the exercise of jurisdiction. While such abstention may appear logically to rest on an assumption of jurisdiction, it is as merits-free as a finding of no jurisdiction. By the same principle on which the Court has approved a discretionary declination to exercise a pendent jurisdiction that may not have existed, it would be proper to dismiss on such grounds (if meritorious) without reaching the FSIA [jurisdictional] issue. Similarly, dismissal for want of personal jurisdiction is independent of the merits and does not require subject matter jurisdiction.

United States District Court, E.D. Pennsylvania.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION Berhad Menara Dayaburni, Jalan Hishamuddin 50712, Kuala Lumpur Malaysia
Plaintiff,

v.

SINOCHEM INTERNATIONAL CO. LTD. 18, 19 F, Jinmao Tower No. 88 Century Boulevard Pudong New Area Shanghai China
Defendant.

No. Civ.A. 03-3771.

April 13, 2004.

MEMORANDUM AND ORDER

VAN ANTWERPEN, J.

This Court entered an Order on March 1, 2004, dismissing this matter on grounds of *forum non conveniens*. Plaintiff Malaysia International Shipping Corporation (MISC) has filed the instant Motion for Reconsideration, pursuant to Federal Rule of Civil Procedure 59(e) and Local Rule 7.1(g), alleging that this Court erroneously weighed private and public factors inherent in a *forum non conveniens* analysis, thus committing manifest errors of law and fact. For the reasons stated below, we disagree, and will deny said motion.

I. FACTUAL BACKGROUND

Our Order granting Defendant Sinochem International Co. Ltd.'s (Sinochem) Motion to Dismiss, filed March 1, 2004, sufficiently details the facts of this case. However, we will briefly outline the pertinent facts. Defendant entered into a contract with a U.S. company for the sale of steel coils, pursuant to which a valid bill of lading, showing that the cargo had been loaded on or before April 30, 2003, had to be issued before the seller could receive payment. The

purchase contract called for any disputes arising out of the contract to be arbitrated under Chinese law.

In Philadelphia, the steel coils were loaded on a vessel, of which Plaintiff MISC was the managing owner, and shipped to China. A bill of lading acknowledging receipt of the cargo, dated April 30, 2003, was issued in Philadelphia. The contract of carriage accompanying the bill of lading called for the application of the Hague Rules, which implicates the Carriage of Goods at Sea Act (COGSA) under U.S. law. The bill of lading also incorporated a charter party,[1] the terms of which currently are undisclosed, but which, according to evidence submitted previously, appear to implicate U.S. law.[2]

Upon arrival at the Chinese port in June 2003, Plaintiff's vessel carrying Defendant's cargo was arrested by order of the Guangzhou Admiralty Court, pursuant to a petition filed by Defendant for preservation of a maritime claim. This claim was based on an allegation that Plaintiff had fraudulently backdated the bill of lading (i.e., dated the bill of lading April 30, 2003, when it actually did not load the shipment until May). As required by the Chinese court's order, Plaintiff paid the U.S. $9,000,000 security bond to obtain release of its vessel, and Defendant filed a complaint in Chinese Admiralty Court, on July 2, 2003.

The Chinese court has since rejected Plaintiff's jurisdictional objections to Defendant's Complaint, which

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[1] *Black's* defines charter party as a "contract by which a ship, or a principal part of it, is leased by the owner, especially to a merchant for the conveyance of goods on a predetermined voyage to one or more places; a special contract between the shipowner and charterer, especially for the carriage of goods at sea." *Black's Law Dictionary* (7th ed.1999).

[2] The appellate opinion from the Guangdong Provincial High Court reveals that the charter party calls for English law to be applied to any disputes, and for the parties to submit to arbitration in London. *See* Civil Ruling, Guangdong Provincial High Court of the People's Republic of China at 2, Pl.'s Reply Br. Ex. 1, Def.'s Response Br. Ex. 2. However, we will view this conflict with the evidence previously submitted to this Court in a light most favorable to Plaintiff and assume that the bill of lading calls for U.S. law.

Plaintiff appealed to China's court of appeal.[3] China's High Court, in a final judgment, affirmed the lower court's decision that this matter falls under Chinese jurisdiction.

On June 23, 2003, Plaintiff filed a Complaint in this Court, alleging that Defendant's accusation of fraud constituted "negligent misrepresentation [to the Chinese Admiralty Court] of [Plaintiff's] vessel's fitness and suitability to load its cargo." (*See* Am. Compl. ¶¶ 30, 34.) On March 1, 2004, this Court issued an Order granting Defendant's Motion to Dismiss and dismissing this matter for *forum non conveniens* without prejudice to Plaintiff's right to proceed in the appropriate Chinese court. Plaintiff now files the instant Motion for Reconsideration, claiming that we erred in our *forum non conveniens* analysis. We disagree. Plaintiff has failed to either identify a change in controlling law, introduce new evidence warranting reconsideration, or identify any manifest error of law of fact. Its disagreement with our weighing of the evidence does not satisfy the high standard for granting a Motion for Reconsideration.

II. ANALYSIS

Motions for reconsideration under Federal Rule of Civil Procedure 59(e) are intended "to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985). They are not available to provide unhappy parties an additional opportunity to sway the court, and "may not be used by litigants to 'rehash' the same arguments and facts previously presented to the court." *Stepanuk v. State Farm Mut. Auto. Ins. Co.*, No. 92-6095, 1993 WL 166748, at *2 (E.D.Pa. May 14, 1993).

As such, the applicable standard in this district is a rather stringent one, generally allowing a motion for reconsideration only on one of three grounds:

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[3] It bears noting that it appears that Plaintiff argued that, based on the terms of the bill of lading and charter party, the appropriate jurisdiction was not the United States, as it contends here, but rather London. *See* Civil Ruling at 2.

> (1) there has been an intervening change in controlling law; (2) new evidence, which was not previously available, has become available; or (3) it is necessary to correct a clear error of law or to prevent manifest injustice.

Klee v. Lehigh Valley Hospital, No. 97-4642, 1998 WL 966011, at *1 (E.D.Pa. Nov.30, 1998), *aff'd*, 203 F.3d 817 (3d Cir.1999). Plaintiff has neither alleged a change in controlling law nor the existence of new evidence. Thus, its motion can survive only if it can demonstrate a clear legal error or a manifest injustice by this Court in our previous order granting Defendant's Motion to Dismiss.

Plaintiff appears to raise three grounds for reconsideration regarding our analysis of *forum non conveniens*: (1) our analysis of public and private interest factors inadequately considered "all of the American witnesses and the import of their testimony"; (2) we erred in our determination of the most convenient forum; and (3) we failed to sufficiently consider American interests. (Pl.'s Br. at 2.) Having neglected to follow its own statement that it be "mindful of the need to . . . not merely [ ] reargue matters dealt with previously," Plaintiff has failed to establish any of these grounds. *See id.*

First, Plaintiff argues that we inadequately weighed private interest factors because "the witnesses in the U.S. far outnumber the Sinochem representatives in the Chinese Admiralty Court," *id.*, and that, despite the fact that China has retained jurisdiction, we should weigh the existence of a parallel suit in Chinese court in favor of Plaintiff. As we found in our prior opinion, the private interest factors that Plaintiff claims compel us to maintain jurisdiction (ease of access to sources of proof and the availability of compulsory process for unwilling witnesses) do not weigh in favor of trying this matter here.

Preliminarily, with respect to access to witnesses, while Plaintiff provides additional detail in the instant motion of the identities and backgrounds of the witnesses it anticipates calling at trial, we cannot credit that information as grounds

for reconsideration because it was available at the time Plaintiff responded to the Motion to Dismiss. It is well established that "[w]here evidence is not newly discovered, a party may not submit that evidence in support of a motion for reconsideration." *Harsco*, 779 F.2d at 909; *see also e.g. Delong Corp. v. Raymond Int'l Inc.*, 622 F.2d 1135, 1140, *overruled on other grounds by Croker v. Boeing Co. (Vertol Division)*, 662 F.2d 975 (3d Cir.1981) (stating that evidence presented in a motion for reargument was available, and thus should have been advanced, at the time the motion for summary judgment was argued).

Plaintiff's response to Defendant's Motion to Dismiss provided only a vague conclusory statement identifying witnesses, which did not explicitly establish their connection to the United States. (*See* Pl.'s Resp. to Def.'s Mot. to Dismiss at 23 ("Witnesses include the Novolog employees, surveyors retained on behalf of the various vessel interests and shipper, the local agent, and so forth. None of these witnesses is located in China. Since the loading took place in Philadelphia, the majority of the witnesses to the loading will be in Pennsylvania.")) Our original opinion considered this statement, noted that, with the exception of the Novolog employees, Plaintiff did not establish any witness' connection to the United States, and determined that consideration of "relative ease of access to sources of proof" did not weigh in favor of trying the matter in the United States. *See Memorandum Opinion* at 18-19; *see also Lacey v. Cessna Aircraft Co.*, 930 F.2d 170, 180 (3d Cir.1991) (identifying the private interest factors to consider in a *forum non conveniens* analysis).

We are prohibited now from considering Plaintiff's additional evidence regarding the identities and connections of the surveyors, as such information was available at the time we considered Defendant's Motion to Dismiss. Furthermore, even if Plaintiff had supplied that additional information at the appropriate time, it would not have been sufficiently compelling to warrant trying this matter here. The multitude of other factors identified in our prior opinion

favoring the Chinese forum would have outweighed this evidence.

Furthermore, contrary to Plaintiff's argument, "the availability of compulsory process for attendance of unwilling witnesses" does not weigh in favor of the United States, as it appears that both forums are equally competent to address unwilling witnesses. While Plaintiff argues that the Chinese court cannot compel attendance of non-party witnesses, it also recognizes that this Court cannot compel witnesses outside of one hundred miles of the Eastern District of Pennsylvania. (Pl.'s Br. at 5); *see also* Fed.R.Civ.P. 45 (discussing the subpoena power of federal courts). Thus, both forums may face some difficulty compelling the appearance of witnesses.

However, China does allow witnesses in distant locations to testify through audio or video technology, as well as admits evidence obtained pursuant to our discovery process. (*See* Decl. of Lu Min on Reconsideration, ¶¶ 7-8 (identifying the specific rules under Chinese law providing for these mechanisms)); *e.g.*, *Sinochem Int'l Co. Ltd. v. Triorient Trading Inc.*, No. 2:03-mc-87-FVA (E.D.Pa. May 20, 2003) (allowing subpoenas to be issued against Pennsylvania companies in furtherance of litigation in a Chinese court). Thus, because both courts would need to use applicable mechanisms for compelling testimony from foreign witnesses, and China has adequate means of addressing this problem, this factor does not weigh in favor of trying this matter in the United States.

Plaintiff's arguments simply cannot outweigh, in addition to the other factors set forth in our prior opinion, the overwhelming evidence of a duplicate matter being litigated in a Chinese court which, with respect to critical private interest factors like cost and time to the parties and witnesses, makes it utterly impractical to proceed in this Court. On February 27, 2004, the Guangdong Higher People's Court in China dismissed Plaintiff's appeal of the Guangzhou Admiralty Court's decision and retained jurisdiction of the case. (Civil Ruling at 2 ("Under Articles

19 of the *Special Maritime Procedural Law of the People's Republic of China*, and Article 243 of the *Code of Civil Procedure of the People's Republic of China*, the Guangzhou Admiralty Court has jurisdiction over this case.")).

Apparently, Plaintiff cannot raise further appeals and the matter is expected to proceed in the Guangzhou court on April 12, 2004. (Decl. of Lu Min, ¶ 5.) We simply cannot justify doubling the expenses of the parties, taxing witnesses twice to participate in litigation, and consuming this Court's scarce resources to replicate the Chinese litigation, especially considering that both parties can make use of our discovery process to assist foreign litigation, through 28 U.S.C. § 1782.[4]

Furthermore, while we certainly agree with Plaintiff that we are a court of an independent, separate sovereign from China, and thus may act independently in determining this matter, we do not understand how this fact supports Plaintiff's argument that we should hear the instant case. Our ruling, at which we arrived wholly independent of that of the Chinese court, is not based on the Chinese court's legal analysis of jurisdiction. Rather, the import of the Chinese matter rests simply in the fact that it exists and is proceeding. As required in any analysis of *forum non conveniens*, we must consider the lack of convenience and heightened burden to the parties of litigating parallel proceedings. *See Piper Aircraft v. Reyno*, 454 U.S. 235, 241, 241 n.6, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) (discussing the *forum non conveniens* analysis and the public and private

[4] We disagree with Plaintiff's characterization of these parallel proceedings as distinct matters because "while these actions have some similar interrelated facts, the parties seek different remedies." (Pl.'s Reply Br. at 4.) Both proceedings arise out of the exact set of facts and focus on the same issue. We further note that Plaintiff argued before the Chinese High Court that these matters were, in fact, identical. (*See* Civil Ruling at 2, Pl.'s Reply Br. Ex. 1 ("The appellee filed the action to Guangzhou Maritime Court in July 2003, which is later in time when (sic) appellant filed the action in the Unite (sic) States. Hence, Guangzhou Maritime Court should not entertain the action brought by the appellee against the appellant for the *same dispute*.") (emphasis added)).

interest factors inherent in such an analysis, all of which focus on the convenience to the parties and to the forum).

The overwhelming significance of ensuring the convenience of all parties, by requiring that they participate in litigation of a specific matter in only one forum, tips the scale heavily toward a finding that, despite the deference we pay to Plaintiff's preferred forum, China presents the most convenient and appropriate forum to hear this matter. To find otherwise would "establish ... oppressiveness and vexation" not only to Defendant, but to all parties involved. *Id.* at 241.

Finally, we did not err in our consideration of American interests. While we underscore that motions for reconsideration do not allow for the rehashing of arguments, and thus we need not reconsider Plaintiff's argument that the choice of law provision in the bill of lading mandates that the case be tried here, we will reiterate our finding from our first judgment that the terms of the bill of lading are not implicated here.[5] In our original opinion, we stated, and Plaintiff does not dispute, that "Plaintiff does not allege a violation with respect to the nature of the carrier's duties to be carried out pursuant to the bill of lading and carriage contract, such as the manner of loading, conditions in transit, or protection of the cargo." *Memorandum Opinion* at 21. Consequently, the provisions of the bill of lading do not come into play.

Moreover, this finding is entirely consistent with Plaintiff's argument that "[u]nder COGSA, the carrier is required to properly and carefully load the goods carried. 46 U.S.C. § 1303(2). In addition, after receiving the goods into his charge, the carrier is required to issue 'a bill of lading showing *among other things*—. . . (c) The apparent order and

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[5] We note that the High Court in China agrees with us, stating that "[s]ince the [Plaintiff] has initially instituted its proceeding on the ground of the joint tort feasance of the two co-defendants, the jurisdiction involved in this case shall not be bound by the arbitration clauses of the Bill of Lading or the maritime cargo shipping contract." (Civil Ruling at 3; Def.'s Br. Ex. 2.)

condition of the goods,'" and that this duty implicitly requires "that the bill of lading accurately reflect[ ] the load." (Pl.'s Br. at 9 (internal citations excluded) (emphasis in original)). Indeed, if Plaintiff was alleging a defect in the "order and condition of the goods," the manner in which the goods were loaded or shipped, or the description of the load in the bill of lading, we likely would find its argument compelling that the terms of the bill of lading, including the choice of law provision, were implicated. However, we reiterate that Plaintiff does not make such an allegation; its sole complaint alleges a tortious action, not a contractual violation, and involves Defendant's allegation that it wrote the wrong date on the bill.

The cargo-loss case cited by Plaintiff in support of its position, *Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841 (2d Cir.1985), further highlights this distinction. There, the Second Circuit applied the choice of law provision called for in the bill of lading where, after having neglected to load all of the cargo supplied by the seller, the carrier erred when it described the full load of goods in the bill of lading. The Second Circuit ruled that the carrier was responsible for the value of the lost cargo because it falsely stated in its bill of lading that it had loaded one hundred bundles of tin ingots, even though it had loaded only seventy bundles. *Id.* at 847-48. As this matter involved conduct by the carrier that adversely affected the cargo, the court appropriately applied the choice of law provision set forth in the bill of lading. Comparatively, here, Plaintiff has raised no such allegation of damage or loss to the cargo.

It is clear that the import of a bill of lading lies in its focus on the conditions and treatment of cargo shipped by a carrier. *Black's* defines a "bill of lading" as "[a] document of title acknowledging the receipt of goods by a carrier. . . ." *Black's Law Dictionary* (7th ed.1999). It further recognizes a bill of lading to have three specific functions, all of which pertain directly to the cargo: (1) serve as a receipt that the specific goods identified in the bill have been loaded on board; (2) document "'the terms of the contract for the carriage of the goods'"; and (3) serve as the document of title, allowing the

owner of the goods to continue to deal with them while they are on board the ship and at sea. *Id.* (quoting William R. Anson, *Principles of the Law of Contract* 380 (Arthur L. Corbin ed., 3d Am. ed.1919)); *see also Brisford Metals*, 779 F.2d at 845 (citing the same three purposes of a bill of lading).

Similarly, the Second Circuit's lengthy discussion in *Berisford Metals* of the import of the bill of lading mentions several cases, all of which involve errors in the bill of lading with respect to the conditions of the cargo or the carrier's actions regarding whether and how it loaded the cargo; all involve some sort of loss or damage to the cargo. *See Brisford Metals*, 779 F.2d at 845-847 (citing *e.g.*, *Higgins v. Anglo-Algerian Steamship Co.*, 248 F. 386 (2d Cir.1918), involving a bill of lading that falsely represented the adequate condition of known damaged goods, and *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha*, 27 F.2d 129 (2d Cir.1928), involving a bill of lading that falsely represented that lost cargo had been loaded in a specific location when the goods had in fact never been loaded).

To beat the proverbial dead horse, it is undisputed that there is no allegation of damage or misconduct with respect to the cargo; rather, the conflict focuses on the date the carrier issued the bill of lading. As such, the function and purpose of the bill of lading are not called into question. Consequently, its choice of law provision is not relevant here.

Plaintiff further avers that our finding "suggests to all that bills of lading for foreign trade shipped out of the United States can be fraudulently created with no consequence." (Pl.'s Br. at 9.) Our *forum non conveniens* analysis finds only that the Chinese admiralty court is the best forum for this matter involving alleged negligent misrepresentations made by a Chinese corporation to a Chinese court. We are confident both that the Chinese court shares our appreciation of the significance of properly-issued bills of lading to

international maritime commerce, and that it is competent to address this underlying allegation.[6]

As Plaintiff points out, a court may dismiss a case when "an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to a plaintiff's convenience,'. . . ." *Piper*, 454 U.S. at 241. It is clear that China presents an adequate alternative forum, and we cannot imagine how a duplicate case, which not only would be inconvenient to the parties but onerous to their witnesses, and which implicates no significant American interests, does not create a substantial enough burden for everyone involved to warrant dismissal in this Court.

III. CONCLUSION

Plaintiff filed the instant Motion for Reconsideration, pursuant to Fed.R.Civ.P. 59(e) and Local Rule 7.1(g), on grounds that we erred in our previous *forum non conveniens* analysis, incorrectly weighing private and public interest factors, and failing to properly consider what it characterized as significant American interests. We find that much of Plaintiff's arguments merely rehashed contentions made earlier in response to Defendant's Motion to Dismiss, and that Plaintiff's disagreement with our analysis does not warrant reconsideration. After careful reconsideration of the issues, we reiterate that China is the best forum to hear this negligence matter between two foreign companies. Thus, we deny the motion. An appropriate order follows.

ORDER

AND NOW, this 13th day of April, 2004, upon full consideration of Plaintiff's Motion for Reconsideration, filed March 15, 2004, Defendant's response thereto, filed March 31, 2004, and Plaintiff's Reply Brief, filed April 7, 2004, it is hereby ORDERED that Plaintiff's Motion is DENIED.

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[6] While not raised previously, we recognize Plaintiff's argument that we should consider the possible joinder of Pan Ocean only to note that we cannot base our findings on mere speculation.

United States District Court, E.D. Pennsylvania.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION BERHAD Menara Dayaburni, Jalan Hishamuddin 50712, Kuala Lumpur Malaysia
Plaintiff,

v.

SINOCHEM INTERNATIONAL CO. LTD. 18, 19 F, Jinmao Tower No. 88 Century Boulevard Pudong New Area Shanghai China
Defendant.

No. Civ.A. 03-3771.

Feb. 27, 2004.

MEMORANDUM AND ORDER

VAN ANTWERPEN, J.

Plaintiff Malaysia International Shipping Corporation (MISC) has brought suit claiming that Defendant Sinochem International Co. Ltd. (Sinochem) made negligent misrepresentations to a Chinese Admiralty Court. Sinochem moves to dismiss MISC's Amended Complaint for lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1), and for lack of personal jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(2) and (b)(5). Additionally, Defendant argues that dismissal of the Amended Complaint is warranted for *forum non conveniens* and Plaintiff's failure to observe the rules of comity. For the reasons stated below, we will grant said motion.

I. FACTUAL BACKGROUND

This matter involves the arrest of a Malaysian vessel in China by order of a Chinese Admiralty Court, pursuant to the petition of a Chinese corporation, which alleges that the Malaysian vessel owner fraudulently back-dated the bill of lading when it loaded the Chinese corporation's cargo. This matter's undisputed connection to the district of this Court is

that the cargo was loaded by an American company, a non-party to this suit, at the Port of Philadelphia in 2003.

The undisputed facts are as follows. Defendant Sinochem, a Chinese company, contracted with Triorent Trading, Inc. (Triorient), an American company located in Connecticut, to purchase a substantial quantity of steel coils. The contract called for the coils to be shipped from the United States to China on or before April 30, 2003, and that, before Triorient could receive payment, *inter alia*, a corresponding valid bill of lading needed to be tendered to the bank where Defendant had opened a line of credit for the purchase of the steel coils. (Pl.'s Br. at 3.) The contract further expressly called for any disputes arising out of the contract to be arbitrated under Chinese law. (Contract, Def.'s Br. Ex. 3 at 3.)

Triorient sub-chartered the vessel on which the coils were shipped from Plaintiff MISC, a Malaysian company and the managing owner of the vessel (Pl.'s Br. at 2), and hired Novolog Bucks County, Inc. (Novolog), a stevedoring company located in Pennsylvania, to load the steel coils onto Plaintiff's vessel at the Port of Philadelphia. A bill of lading was issued, acknowledging receipt of the cargo, and the vessel set sail for China. (Pl.'s Br. at 3.) The bill of lading was dated April 30, 2003, and lists Triorient as the shipper and Pan Ocean Shipping Co., Ltd. (Pan Ocean) as the carrier. Defendant was identified as the party to notify, signifying that it is the end receiver; Plaintiff is not mentioned on the bill. The contract of carriage accompanying the bill of lading calls for the application of the Hague Rules, which implicates the Carriage of Goods at Sea Act (COGSA) under U.S. law. The bill of lading also incorporates a charter party,[1] the terms of which Pan Ocean will not disclose; however, its counsel states in a letter that the charter party implicates U.S. law.

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[1] *Black's* defines charter party as a "contract by which a ship, or a principal part of it, is leased by the owner, especially to a merchant for the conveyance of goods on a predetermined voyage to one or more places; a special contract between the shipowner and charterer, especially for the carriage of goods at sea." *Black's Law Dictionary* (7th ed. 1999).

Upon arrival at the Chinese port in June 2003, Plaintiff's vessel carrying Defendant's cargo was arrested by order of the Guangzhou Admiralty Court, pursuant to a petition filed by Defendant for preservation of a maritime claim. This claim was based on an allegation that Plaintiff had fraudulently backdated the bill of lading (*i.e.*, dated the bill of lading April 30, 2003, when it actually did not load the shipment until May). According to Defendant, this alleged fraud infringed its rights and caused significant financial loss. (Civil Decision, Pl.'s Br. Ex. C and Def.'s Br. Ex. 2.) As required by the ruling, Plaintiff paid the ordered US $9,000,000 security bond to obtain release of its vessel and Defendant filed a complaint in Chinese Admiralty Court. (*See* Civil Decision; Def.'s Br. at 2.)

The matter involving Defendant's Complaint, filed on July 2, 2003, that Plaintiff fraudulently backdated the bill of lading, is currently proceeding before a judge in the Chinese Admiralty Court. Plaintiff has contested the jurisdiction of the Chinese court on grounds either that the charter party incorporated in the bill of lading calls for the application of U.S. law or that the commencement of the instant action before this Court, on June 23, 2003, obviates the need for the Chinese court to entertain the matter. (*See* Huang Ya Quan Affirmation and Statement of Appeal, Pl.'s Br. Ex. A.) Rejecting this jurisdictional objection, the Guangzhou court dismissed Plaintiff's application. Plaintiff has since appealed the ruling to the Guangdong Provincial High Court, China's court of appeal. The High Court's decision remains pending. (Huang Ya Quan Affirmation, Pl.'s Br. Ex. A ¶ 9.)

The Complaint filed in this Court stems from the same incident and runs parallel to the matter before the Chinese Admiralty Court; both matters turn on whether Plaintiff fraudulently back-dated the bill of lading. Denying these allegations of fraud, Plaintiff in the instant matter claims damages resulting from Defendant's alleged "negligent misrepresentation [to the Chinese Admiralty Court] of [Plaintiff's] vessel's fitness and suitability to load its cargo," which resulted in substantial financial losses due to the

Chinese court's arrest of the vessel. (*See* Am. Compl. ¶¶ 30, 34.)

Defendant has filed the instant Motion to Dismiss for lack of subject matter and personal jurisdiction. If we find that we have jurisdiction over this matter, Defendant further contends that we should decline to entertain this claim on grounds of *forum non conveniens* and Plaintiff's failure to observe the rules of international comity by engaging in forum-shopping.

We find that we do have subject matter jurisdiction, as this is a matter or admiralty or maritime jurisdiction. We further find that, while Plaintiff cannot establish personal jurisdiction over Defendant through Pennsylvania's long-arm statute, limited jurisdictional discovery could establish personal jurisdiction through the federal long-arm statute. However, the taking of such discovery will not be necessary because we find that the Chinese Admiralty Court is the best venue and authority to address this matter and we thus grant the Motion to Dismiss for *forum non conveniens*.

II. ANALYSIS

A. *Subject Matter Jurisdiction*

Defendant objects to this Court having subject matter jurisdiction over this case and argues the absence of such jurisdiction on three bases: (1) maritime jurisdiction; (2) diversity; and (3) federal question through the Carriage of Goods by Sea (COGSA) or Harter Acts. Because we conclude that this matter falls within federal maritime jurisdiction, we find that we do have subject matter jurisdiction, and deny Defendant's motion as to this argument.

Plaintiff asserts that this case is one of admiralty or maritime jurisdiction, giving us original subject matter jurisdiction, pursuant to 28 U.S.C. § 1333. We agree. For a plaintiff to establish jurisdiction under § 1333, it must satisfy a two-prong test, establishing both a location and a connection to maritime activity.

With respect to location, Plaintiff must show either that "the tort occurred on navigable water or [that the] injury suffered on land was caused by a vessel on navigable water." *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995); *Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 179 (3d Cir.1995).

Plaintiff easily establishes this first prong of the test, as the Third Circuit's finding in *Neely* so instructs. There, the plaintiff filed suit in the Eastern District of Pennsylvania, claiming violations of maritime law, after being injured by the propellers of a scuba diving vessel that was anchored in the coastal waters of St. Lucia. *Neely*, 63 F.3d at 170. Concluding that the district court had subject matter jurisdiction, the Third Circuit found that "the locality test is readily satisfied, for plaintiff's injuries occurred in navigable waters and were caused there by a vessel." *Id.* at 179.

Contrary to some district court holdings in the Second and Fourth Circuits, which Defendant cites in an effort to narrow the scope of the locality test, *Neely* demonstrates that the Third Circuit does not invoke an additional element requiring that the "navigable water" be under the jurisdiction of the United States.[2] Thus, the fact that the vessel was seized in China is of no consequence. As the seizure occurred on navigable water, at a port in China, Plaintiff's Complaint satisfies the locality prong.

Further, to establish the requisite connection to maritime activity, Plaintiff must show both that the general features of the alleged negligence "had 'a potentially disruptive impact on maritime commerce,'" and that "'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" *Grubart*, 513 U.S. at 534 (quoting *Sisson v. Ruby*, 497 U.S. 358, 364 n.2,

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[2] To state the obvious, St. Lucia is not part of the United States, but rather its own commonwealth, having received its independence from Great Britain in 1979. *See* http://www.stlucia.gov.lc/saint_lucia/saintluciaconstitution/the_saint_lucia_constitution.htm

365, 364, and n.2, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990)). This matter satisfies both of these elements.

While neither party characterizes the general features of this matter, we note that throughout their briefs, Plaintiff focuses on the loading of the cargo in Philadelphia and the alleged fraudulent bill of lading as the critical incident, while Defendant emphasizes the arrest of the vessel in the Chinese port. For these purposes, we need not establish which incident is the relevant activity because the general features of both activities have a sufficient connection with maritime activity. We look to the Supreme Court for guidance in describing the general character of these incidents.

In *Sisson*, which involved damages to a marina on Lake Michigan, as well as vessels docked nearby, resulting from a fire that ignited on a pleasure yacht docked there, the Supreme Court characterized the incident for jurisdictional purposes as "a fire on a vessel docked at a marina on navigable waters." 497 U.S. at 363. Following this lead, we characterize this incident either as the improper loading of cargo on a vessel docked at a port on navigable waters or the arrest of a vessel docked in navigable waters. Both scenarios have a potentially disruptive impact on maritime commerce.

The possible effects on maritime commerce of untimely, or otherwise improper, loading of cargo are obvious and far-reaching. Similarly, it is clear that the seizure of a vessel has the potential to disrupt commercial activity, as such an arrest hinders the ability of the vessel to carry out further commercial transactions. *See Neely*, 63 F.3d at 179 (finding a potential disruptive impact on maritime commerce in part because the incident "could lead to delays in commercial shipping").

Furthermore, both the arrest of a vessel and the improper loading of a vessel at a dock on navigable waters have clear and substantial relationships to maritime activity. Based on its desire to protect maritime commerce, which is the fundamental purpose underlying maritime jurisdiction, the Supreme Court has stated that all "activities traditionally undertaken by vessels, commercial or noncommercial," have

a substantial relationship to maritime activity. *Id.* at 367 (citing *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982)). As such, the Court in *Sisson* found that docking a ship was an important maritime activity because, at a marina, vessels often remained for long periods of time and received fuel supplies. Accordingly, the storage and maintenance of a ship at a marina had a substantial relationship to maritime activity. *Id.* Similarly, loading a ship, which is done while the ship is docked at a marina and which involves actions very similar to obtaining supplies, is substantially related to maritime activity.

Furthermore, if activities undertaken by vessels have a substantial relationship to maritime activity, it logically follows that actions carried out *to or against* vessels would also have a substantial relationship to maritime activity. As such, the very serious act of arresting a vessel at a port sufficiently relates to maritime activity to establish subject matter jurisdiction.

Because this matter occurred on navigable water and has a sufficient connection to maritime activity, we find that it falls within the scope of admiralty or maritime jurisdiction. As such, we appropriately have subject matter jurisdiction over this claim.[3]

B. *Personal Jurisdiction*

Defendant next argues that we should dismiss this Amended Complaint, pursuant to Fed.R.Civ.P. 12(b)(2), for lack of personal jurisdiction. In furtherance of this argument, Defendant contends that this Court lacks specific jurisdiction because Defendant has no place of business in Pennsylvania and has not availed itself of the privileges of Pennsylvania commerce.

As Defendant has contested personal jurisdiction, the burden lies with Plaintiff to demonstrate "with reasonable

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[3] As we find that this admiralty matter falls within this Court's subject matter jurisdiction, we need not address Defendant's objections with respect to diversity or federal question subject matter jurisdiction.

particularity" the sufficiency of the non-resident Defendant's activities in Pennsylvania. *Provident Nat'l Bank v. Cal. Fed. Savings & Loan Assoc.*, 819 F.2d 434, 437 (3d Cir.1987). We find that Plaintiff has not identified sufficient minimum contacts to establish personal jurisdiction, either specific or general, based on the Pennsylvania long-arm statute.[4] However, we do find that, with limited jurisdictional discovery, Plaintiff might be able to establish jurisdiction pursuant to the federal long-arm statute, under Fed.R.Civ.P. 4(k)(2).

1. *Pennsylvania Long-Arm Statute, Pursuant to Fed.R.Civ.P. 4(e)*

Under Fed.R.Civ.P. 4(e), a federal district court has personal jurisdiction over a non-resident defendant if a state court would have that power. *Dollar Sav. Bank v. First Sec. Bank of Utah*, 746 F.2d 208 (3d Cir.1984). Accordingly, we look to the Pennsylvania long-arm statute, 42 Pa. Cons. Stat. Ann. §§ 5301 *et seq.* (Purdon 1981 & Supp. 1989), to determine whether facts or circumstances exist to require Defendant to answer in this forum. Section 5322(b) of the long-arm statute authorizes both general and specific jurisdiction to the "fullest extent allowed under the Constitution of the United States." Thus, because Pennsylvania's "reach is coextensive with the limits placed on states by the federal constitution," *Vetrotex Certaineed Corp. v. Consolidated Fiber Glass Products Co.*, 75 F.3d 147, 150 (3d Cir.1996), we apply the familiar two-part test summarized below.

The interpretation of the United States Constitution by Pennsylvania courts does not, however, bind federal courts. Instead, we must look to federal constitutional doctrine in assessing Defendant's susceptibility to personal jurisdiction in Pennsylvania. The Fourteenth Amendment due process

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[4] The analysis that follows a [sic] pertains solely to specific jurisdiction. Plaintiff does not contest Defendant's argument that it does not have the continuous and systematic contacts to establish general jurisdiction, and we think that Defendant's clear showing of an absence of general jurisdiction obviates the need for any such discussion.

clause limits the power of the state to assert personal jurisdiction over a nonresident defendant. *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L.Ed. 565 (1877). The basic factors for ascertaining whether the exercise of personal jurisdiction over a nonresident defendant is proper were set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). That case held that due process is satisfied when a nonresident defendant has such minimum contacts with the forum state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (internal citation omitted).

The Third Circuit Court of Appeals has cogently summarized the applicable two-part inquiry:

> First, the defendant must have made constitutionally sufficient 'minimum contacts' with the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985). The determination of whether minimum contacts exist requires an examination of the 'relationship among the forum, the defendant and the litigation.' *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977), in order to determine whether the defendant has 'purposefully directed' its activities towards residents of the forum. *Burger King*, 471 U.S. at 472, 105 S.Ct. at 2182 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984)). There must be 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). Second, if 'minimum contacts' are shown, jurisdiction may be exercised where the court determines, in its discretion, that to do so would comport with 'traditional notions of fair play and substantial justice.' *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

Vetrotex, 75 F.3d at 150-151. "Specific jurisdiction" is invoked when the cause of action arises from, or is related to, the defendant's contacts with the forum, such that the defendant "should reasonably anticipate being haled into court there." *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 n.8, 415, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

We find that Plaintiff has failed to establish sufficient minimum contacts. As the primary contact to Pennsylvania, Plaintiff argues that Defendant availed itself of the benefits of this jurisdiction when it applied for an order from this Court allowing it to take discovery for the purposes of foreign litigation in a related matter.[5] (*See* Pl.'s Br. at 15.) However, we agree with Defendant that this independent action does not give rise to personal jurisdiction, as the prior order involved a separate matter not being litigated in this country, much less this jurisdiction, and a different party.

While Plaintiff correctly quoted Third Circuit precedent that parties seeking affirmative relief in a particular court typically subject themselves to that jurisdiction for litigating matters arising from the same subject matter, *Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 443 (3d Cir.1999), *Bel-Ray* and the other cases cited both in *Bel-Ray* and by Plaintiff are clearly distinguishable because they involve proceedings between the same parties all within the same suit.

For example, the *Bel-Ray* court denied the defendants' personal jurisdiction defense because, prior to asserting that defense, the defendants had moved for, and litigated, summary judgment on a counterclaim. Those actions, made within the same case and involving the same party against whose claims they attempted to assert the personal

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[5] While it seems to have arisen from the same subject matter as the instant claim, this matter, 2:03-mc-00087-FVA, involved a foreign action by Defendant against an entity not a party to this case, for which Defendant needed records from two Pennsylvania companies, neither of which are parties to the instant suit.

jurisdiction defense, effectively constituted a waiver of that defense. *Id.* at 443-44.

In so finding, the *Bel-Ray* court relied on earlier Third Circuit case law that "held that a defendant who participates in the adjudication of the plaintiff's application for a preliminary injunction without securing a determination of his challenge to the court's personal jurisdiction over him submits himself to the jurisdiction of the court. . . ." *Id.* (discussing *Wyrough & Loser, Inc. v. Pelmor Labs., Inc.*, 376 F.2d 543, 547 (3d Cir.1967)). Again, just as in *Bel-Ray*, *Wyrough* involved proceedings within the same case arising from the same subject matter involving the same parties.

Similarly, the Supreme Court in *Adam v. Saenger*, which Plaintiff also cites, found that a procedure allowing judgment against the plaintiff, against whom the defendant had filed a cross-claim, does not violate the due process clause because "the plaintiff, having, by his voluntary act [of filing a claim,] in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence." 303 U.S. 59, 67-68, 58 S.Ct. 454, 82 L.Ed. 649 (1938).

Unlike the aforementioned cases, not only did the prior matter involving Defendant before this Court not involve Plaintiff or this negligence claim, but it did not even involve a claim seeking relief from another party. *See Wyrough*, 376 F.2d at 547 (reasoning that because the hearing would resolve factual conflicts and could grant some relief, the party's participation in that proceeding waived the personal jurisdiction defense as to the specific litigation in that case). Rather, Defendant merely filed an application to take discovery from two companies based in Pennsylvania, who are not parties to this suit, in furtherance of foreign litigation against another non-party to this suit. In fact, Defendant filed the application for the Order permitting discovery on May 15, 2003, almost one month prior to Plaintiff's vessel even arriving in China.

The application and corresponding order for discovery involving parties *not* part of the instant suit in furtherance of a matter *not* being litigated in this country simply does not rise to the level of establishing a contact with Pennsylvania such that Sinochem would expect to be haled into court here on a completely different claim.

Finally, to find Defendant's prior discovery application and this Court's order relevant to a determination of personal jurisdiction in this case would be inconsistent with other findings in this circuit. *See, e.g., Paul Yanuzzi Builders, LLC v. Music Mountain Assocs., L L C*, No. 02-cv-7438, 2003 WL 925368, at *2 (E.D.Pa. Feb. 28, 2003) (finding that the defendants did not submit to personal jurisdiction by requesting discovery prior to raising the defense). We find that Defendant did not establish a minimum contact with Pennsylvania for purposes of this case by seeking an order to take discovery in a separate matter.

As such, the sole remaining alleged minimum contact to this jurisdiction is the fact that the cargo at issue was loaded onto the vessel in Philadelphia.[6] (*See* Pl.'s Br. at 16-17 (identifying Defendant's minimum contacts alleged to be substantial enough not to violate the Due Process Clause)). However, this contact alone does not survive a due process analysis, such that Defendant would reasonably expect to be haled into court here. As such, Plaintiff has not demonstrated that this Court has specific jurisdiction over Defendant through Pennsylvania's long-arm statute.

2. *Federal Long-Arm Statute, Pursuant to Fed.R.Civ.P. 4(k)(2)*

We do find, however, that provided limited discovery, Plaintiff might be able to identify sufficient national contacts to establish personal jurisdiction over Defendant through the federal long-arm statute. However, because we grant

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[6] Additionally, Plaintiff argues that Defendant's purchase of the cargo from Pennsylvania was a further minimum contact. However, Plaintiff's own pleadings indicate that Defendant contracted with Triorient Trading, Inc., a Connecticut corporation, to purchase the steel coils. (*See* Pl.'s Br. at 18.)

Defendant's Motion to Dismiss on other grounds, we will not order such discovery.

Under Rule 4(k)(2), a plaintiff may establish that a court has personal jurisdiction over a defendant if it can show that: (1) the claim arises under federal law; (2) the defendant does not have general jurisdiction in any state; and (3) jurisdiction would survive a due process analysis.[7]

While the Third Circuit has not ruled on whether Rule 4(k)(2) applies to matters of maritime jurisdiction, in a case of first impression for this Circuit, the District of the Virgin Islands relied on "its own reading of the rule, and the similar reasoning used in the currently unanimous body of case law on point," to hold Rule 4(k)(2) applicable to cases of admiralty and maritime law. *Western Equities, Ltd. v. Hanseatic, Ltd.*, 956 F.Supp. 1232, 1235 (D.Vi.1997) (citing the only other opinions at the time to address this issue, all but one of which found that Rule 4(k)(2) encompasses maritime cases). The sole opinion to find to the contrary was reversed by the Fifth Circuit, which held that federal law does include maritime cases, as applied to Rule 4(k)(2). *World Tanker Carriers Corp. v. My Ya Mawlaya*, 99 F.3d 717, 722-723 (5th Cir.1996) (discussing the federal nature of maritime law and citing numerous cases that have stated that admiralty cases are federal law). Since *Western Equities*, no case in our Circuit has held otherwise. Thus, we follow our sister court and find that the federal long-arm statute does apply to admiralty cases.

With respect to the second element of the test, Defendant's own arguments, coupled with the absence of argument regarding personal jurisdiction from Plaintiff,

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[7] The rule states

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state. Fed.R.Civ.P. 4(k)(2).

make clear that it does not have general jurisdiction in Pennsylvania. *See* Def.'s Br. at 14-16 (arguing absence of personal jurisdiction). However, it is unclear whether any other state may have general jurisdiction over Defendant. Despite Defendant's averment that it "is incorporated and has its principal place of business in China" (Dacheng Decl. ¶ 8), it is uncertain whether Defendant has "continuous and systematic contacts" with any forum in the United States, from which general jurisdiction would arise. *General Elec. Co. v. Deutz Ag*, 270 F.3d 144, 150 (3d Cir.2001) (citing *Helicopteros*, 466 U.S. at 414-16); Def.'s Br. at 14. We would allow minimal jurisdictional discovery to make this determination.

Similarly, it is uncertain whether Defendant has sufficient minimum contacts with the United States to survive a due process analysis. The "widely adopted" test applied by the court in *Western Equities* to determine whether the defendant had enough minimum contacts considered three factors with respect to the defendant:

> (1) transacting business in the United States; or
> (2) doing an act in the United States; or
> (3) having an effect in the United States by an act done elsewhere.

Western Equities, 956 F.Supp. at 1237.

Defendant avers that its personnel work in China, that it has no place of business in the United States, and that it neither advertises nor solicits business in the United States. (Dacheng Decl. ¶¶ 8-9.) However, Plaintiff claims that Defendant does have "enterprises in the United States which may be related for purposes of jurisdiction" (Pl.'s Br. at 20), and we are required to interpret all factual disputes in a light most favorable to the plaintiff. *Toys "R" Us. Inc. v. Step Two. S.A.*, 318 F.3d 446, 457 (3d Cir.2003).

Moreover, Defendant has undoubtedly transacted business in the United States, as its contract with the Connecticut-based Triorient demonstrates, and, according to the contract, the cargo that Defendant purchased was to be shipped from an American port. (*See* Contract, Def.'s Br. Ex. 3.)

However, the Supreme Court has made clear that a contract alone cannot establish sufficient minimum contacts in the home forum of the other party. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *BP Chemicals, Ltd. v. Formosa Chemical & Fibre Corp.*, 229 F.3d 254, 260 (3d Cir.2000); *see also Sunbelt Corp. v. Noble, Denton & Assoc., Inc.*, 5 F.3d 28, 32 (3d Cir.1993) ("a nonresident's contracting with a forum resident, without more, is insufficient to establish the 'minimum contacts' required for the exercise of personal jurisdiction over the nonresident.").

The Court further informs us that, with respect to establishing specific jurisdiction, "[i]t is ... prior negotiations and contemplated future consequences [of the contract], along with the terms of the contract and the parties' actual course of dealing [ ] that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." *Burger King*, 471 U.S. at 479; *BP Chemicals*, 229 F.3d at 260.

Given the uncertainty with respect to possible Sinochem enterprises that do business in the United States or any Sinochem business that has an effect on the United States, as well the instruction provided us by the Supreme Court in *Burger King* regarding the significant aspects of Defendant's contract for determining jurisdiction, we would be inclined to allow limited discovery to determine whether Plaintiff can establish personal jurisdiction, either through the identification of other enterprises that Plaintiff claims could be related, or through additional information with respect to the parties' dealings. So long as Plaintiff alleges facts "that suggest 'with reasonable particularity' the possible existence of the requisite 'contacts between [the party] and the forum state, the plaintiff's right to conduct jurisdictional discovery should be sustained.'" *Id.* at 456 (quoting *Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino*, 960 F.2d 1217, 1223 (3d Cir.1992)).

Plaintiff's allegations with respect to other Defendant enterprises in the country, as well as the undisputed facts

averred with respect to the [sic] how the contract was carried out, render Plaintiff's claim far from frivolous. Thus, we would refrain from ruling on whether the federal long-arm statute, Rule 4(k)(2), permits personal jurisdiction over Defendant until after the parties had taken limited jurisdictional discovery. However, as the ensuing analysis shows, this discovery will not be necessary because we will dismiss this matter for *forum non conveniens*.

C. *Forum Non Conveniens*

Defendant next argues that, even if we were to find the requisite subject matter and personal jurisdiction, we still should decline jurisdiction in this matter for *forum non conveniens*, as the witnesses to this matter, many of whom are based in Asia, reside outside this jurisdiction. (Def.'s Br. at 17.) Preliminarily, we note that we are required to indicate how much deference to pay to this foreign plaintiff's choice of forum. Consistent with our sister court's prior findings, "we will not lightly disturb plaintiff's choice of forum and will hold defendant[ ] to establishing a strong preponderance in favor of dismissal." *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 179 (3d Cir.1991) (Lacey II) (quoting *Lacey v. Cessna Aircraft Co.*, 736 F.Supp. 662, 664 (W.D.Pa.1990), *rev'd on other grounds* by *Lacey II*).

To warrant a dismissal on these grounds, Defendant bears the burden of establishing two elements: an adequate alternative forum and that both public interest and private factors weigh heavily towards dismissing the case. *Id.* at 180.

A defendant typically can satisfy the first element by showing that it is "amenable to process" in another jurisdiction. *Id.* (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n. 22, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)) (citation omitted in original). As reflected in the absence of any argument to the contrary from Plaintiff, the existence of the parallel proceeding commenced by Defendant in Chinese Admiralty Court easily establishes the existence of an adequate alternative forum.

We next consider the private interest factors, which include:

> relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make a trial of a case easy, expeditious and inexpensive.

Id. at 180 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)).

The main witnesses with respect to the loading of the ship would be personnel from the stevedoring company that loaded the cargo onto the ship and the crew members of the vessel that sailed it to China, as well as "surveyors retained on behalf of the various vessel interests and shipper, [and] the local agent." (*See* Pl.'s Br. at 23 (identifying some of the witnesses.)) Additionally, Defendant's representatives who made the alleged misrepresentations to the Chinese Admiralty Court would also have to be available. The only such persons clearly associated with the United States are the Novolog employees who loaded the cargo on the ship. The members of the crew are Filipino[8] and Defendant's representatives are Chinese. While Plaintiff argues that neither the surveyors nor the local agent are located in China, Plaintiff fails to identify their connection to the United States.

Furthermore, while we acknowledge Plaintiff's averments that the Chinese system of discovery and documentation may not be as broad or as facilitative as the American system, we have no reason to doubt the competence and justness of the system the Chinese courts do have in place. (*See* Lu Min

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[8] Def.'s Br. Ex. 5. While it appears as though Exhibit 5 may not include the entire list of crew members—it is p. 2 of a facsimile and the names through the bottom of the sheet suggest that there could be a continuation—we accept it as the full list, as Plaintiff does not contest it and Lu Min avers to it. (*See* Lu Min Decl. ¶ 13.)

Reply Decl. ¶ 6.)[9] Additionally, because irrespective of our ruling here, Plaintiff still must litigate this matter in the Chinese court, the costs inherent in translation and interpretation would only increase if we maintained jurisdiction. The existence of the Chinese litigation, which would require travel to China anyway, further negates Plaintiff's argument with respect to the travel costs of American witnesses.

Additionally, we must consider public interest factors in determining *forum non conveniens*, which include:

> the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in application of foreign laws; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Id. (quoting *Piper*, 454 U.S. at 241 n.6)).

The sole applicable public interest issue here involves choice of law, and we find that such an analysis would render this matter one of Chinese law. A choice of law analysis requires, as a threshold issue, that we establish whether this matter implicates significant U.S. interests. In other words, we must find one of five factors:

> 1) injury to an American seaman or a seaman with America [sic] dependents,
> 2) injury in American territory,
> 3) American defendants,
> 4) an American flagged ship, or
> 5) a contractual choice of law clause specifying American law.

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[9] While we recognize that the declaration of Plaintiff's witness describes China's discovery procedure more negatively than that of Defendant's witness (*Compare* Huang Ya Quan Unsworn Decl. ¶ 15 *with* Lu Min Reply Decl. ¶ 6), and we are required to interpret factual disputes in favor of Plaintiff, the non-moving party, we do not find their statements to be inconsistent.

Neely, 63 F.3d at 182.[10] The undisputed relevant facts reflect an absence of the first four factors.

The sole possible factor implicating U.S. interests involves the choice of law clause, in the charter party, which the bill of lading incorporates. (*See* Conditions of Carriage for Bill of Lading, Pl.'s Br. Ex. A.) However, the letter identifying U.S. law as the law of choice in the charter party does not state whether the charter party calls for U.S. law to apply specifically to this type of negligence matter, and the context of the letter suggests that Pan Ocean's concession regarding American law resulted from an inquiry from Plaintiff with respect *not* to this suit or any allegations of negligence by Defendant, but rather with respect to Plaintiff's attempts under Chinese law to secure release of its vessel. (*See* Pl.'s Br. Ex. A, Clyde & Co. letter (stating both that the carrier was "prepared to indicate that the [charter party] provides for New York arbitration with U.S. law to apply," but that their "understanding of PRC law [ ][was] that such a provision . . . [was] unlikely indeed to induce the Chinese court to order the release of the vessel without security.")).

Furthermore, while we recognize that the bill of lading, especially as it incorporates the charter party, calls for the application of U.S. law, we disagree with Plaintiff's argument that it has any relevance to this negligence matter. (*See* Pl.'s Br. at 29.) The allegations of fraud underlying the negligence claim involve the issuance of the bill of lading, not the actual conditions of carriage, such as the handling of the cargo, to which the choice of law provision in the bill of lading would apply. Stated another way, Plaintiff does not allege a violation with respect to the nature of the carrier's duties to be carried out pursuant to the bill of lading and carriage contract, such as the manner of loading, conditions in transit, or protection of the cargo.

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[10] Upon meeting this threshold, we would have to determine whether it would reasonable, under the circumstances, to apply American law. *Id.* For purposes of our analysis, we need not make this finding, as it would not affect our determination regarding *forum non conveniens*.

Rather, its dispute involves solely the date on which the cargo was loaded and whether Plaintiff fraudulently backdated the bill of lading, thus validating the contract for the sale of the steel coils and allowing the buyer to withdraw monies from Defendant's line of credit. This matter does not implicate the choice of law clause in the bill of lading; rather, the choice of law clause more applicable to this matter is that of the purchase contract of the steel coils, which calls for the use of Chinese law.

The Third Circuit has stated that one of the two main purposes for conducting a choice of law analysis with respect to admiralty law "is to assure that American maritime law is not applied to incidents that lack any significant American connection." *Neely*, 63 F.3d at 181. We find that this matter "lack[s] any significant American connection." While the loading of the cargo, the date of which we concede is critical to the matter, occurred in the United States, Plaintiff's claim does not allege any wrongdoing with respect to the manner in which the American company loaded the cargo, the environment at the U.S. port where the cargo was loaded, or the general handling of the cargo. Indeed, no American company is a defendant, much less a party to this matter.

Moreover, the loading of the cargo could have happened anywhere in the world and it would not have changed the circumstances of this litigation; the fact that it occurred at a U.S. port by an American stevedoring company was a function of the purchase contract with a nonparty to this matter, not alleged in this suit to have engaged in any wrongdoing. The actual injury, the arrest of the vessel, occurred in Chinese territory, pursuant to an order by a Chinese court, at the request of a Chinese corporation. The interests of the United States are not implicated here.

As such, we find that, despite the deference we pay to Plaintiff's choice of forum, we find that Defendant has established a strong preponderance of dismissal, as this matter is best litigated in the Chinese Admiralty Court.[11]

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[11] Aside from legal argument, we are confident that the Chinese Admiralty Court can competently and justly handle this matter. Plaintiff

The existence of a parallel proceeding in the Chinese Admiralty Court negates any argument of convenience with respect to litigating the matter here, as, irrespective of our ruling, Plaintiff will have to litigate this matter in China. Moreover, with the exception of the American employees of the stevedoring company who loaded the vessel, most, if not all, of the witnesses are based in Asia. Finally, the Chinese Admiralty Court arrested the Malaysian vessel at a Chinese port, pursuant to Chinese law, at the request of a Chinese corporation; no American companies or interests are at stake. We have no reason to second-guess the authority of Chinese law or the competence of its courts; this matter is appropriately addressed there. We grant Defendant's Motion to Dismiss and close this case on grounds of *forum non conveniens*.[12]

III. CONCLUSION

Defendant filed the instant Motion to Dismiss, pursuant to Fed.R.Civ.P. 12, on grounds of lack of subject matter jurisdiction, personal jurisdiction, *forum non conveniens*, and forum-shopping. We find that while we do have subject

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(continued...)

does not contest that the Chinese Admiralty Court is a well-established court, which handles more than 2000 cases per year, the majority of which involve non-Chinese parties, or that the presiding judge on this matter has nineteen years of judicial experience. (Lu Min Decl. ¶¶ 19, 21.) Additionally, while there seems to be some disagreement as to the extent of Chinese discovery and evidentiary practice relative to that in the United States, the Chinese system appears to have competent and orderly practice and procedure capable of justly addressing matters involving foreign entities. (*Compare* Huang Ya Quan Affirm. ¶¶ 14-15, 17 *with* Lu Min Decl. ¶¶ 6-8 (debating China's discovery practice and its evidentiary procedure regarding witness testimony.)) Moreover, neither party should face any prejudice regarding discovery available in the United States because, as Defendant has utilized in a related matter before the Chinese court, our system permits the use of the American discovery process for the purpose of foreign litigation.

[12] Because we dismiss this case for *forum non conveniens*, we need not reach Defendant's arguments regarding the rules of international comity and forum-shopping.

matter jurisdiction, and may have personal jurisdiction, because the Chinese Admiralty Court is competent and in the best position to try this matter between Asian parties, we grant the motion on grounds of *forum non conveniens*. As such, we need not reach the issue of forum-shopping. An appropriate order follows.

ORDER

AND NOW, this 27th day of February, 2004, after full consideration of Defendant's Motion to Dismiss, filed January 5, 2004, Plaintiff's response thereto, filed February 4, 2004, and Defendant's reply, filed February 17, 2004, it is hereby ORDERED that said motion is GRANTED and this case is DISMISSED without prejudice to Plaintiff's right to proceed on this matter in the appropriate Chinese Admiralty Court. This case is closed.

U.S. Constitution: Fifth Amendment

Fifth Amendment - Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Civil Procedure Rule 4

United States Code Annotated

II. Commencement of Action; Service of Process, Pleadings, Motions, and Orders

Rule 4. Summons

* * * *

(k) Territorial Limits of Effective Service.

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(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

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